85-819

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, Local 550, TWU, AFL-CIO, et al.

Petitioners,

vs.

AMERICAN AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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76 pp

QUESTIONS PRESENTED

1. After reversing the district court's decision that certain terms of its own class action settlement agreement were clear and unambiguous, did the court of appeals violate this Court's ruling in Anderson v. City of Bessemer by reviewing incomplete extrinsic evidence in the record de novo and then deciding previously undecided issues of fact with finality?

2. After the district court had reviewed and approved a class action settlement agreement pursuant to Fed.R.Civ.P. 23(e) and ordered specific performance based upon its interpretation of that agreement, did the court of appeals err by ignoring the district court's interpretation and substituting its own interpretation based upon extrinsic evidence not considered by the district court?

3. After reversing the district court's grant of specific performance, did

the court of appeals err by not remanding but rather proceeding to adjudicate the petitioners' alternative motion on the merits -- even though the district court had never considered this motion and even though the court of appeals' decision required a determination of numerous disputed issues of fact on an incomplete evidentiary record?

THE PARTIES

The petitioners represent those members of a certified class of stewardesses who had been terminated from their employment with the respondent because they had become pregnant and given birth to a child. Petitioners were subsequently rehired by the respondent pursuant to a written settlement agreement previously entered in this cause and approved by the district court pursuant to Fed.R.Civ.P. 23(e). The certified class representative is Darlene Burmeister (formerly Darlene Preston). The respondent is American Airlines, Inc.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review its judgment and opinion entered in this case on June 7, 1985.

OPINIONS BELOW

The opinion of the court of appeals is reported at 763 F.2d 875 (7th Cir. 1985) and is reproduced in the appendix hereto, at pages 1a-23a. The order of the court of appeals denying rehearing is unreported, but is reproduced in the appendix hereto, at page 29a. The district court's opinion is unreported, but is reproduced in the appendix hereto, at pages 24a-28a.

JURISDICTIONAL STATEMENT

The court of appeals entered its opinion in this case on June 7, 1985. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on August 15, 1985. This Court has jurisdiction to review the decision of the court of appeals by writ of certiorari under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Fed.R.Civ.P. 23(e):

> "**Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs."

STATEMENT OF THE CASE

Genesis of the Litigation

In 1970, the Airline Stewards and Stewardesses Association, Local 550 ("ALSSA") commenced this action by filing a Complaint against the respondent, American Airlines, Inc. ("American") in the United States District Court for the Northern District of Illinois, Eastern Division, Case No. 70 C 2069. The Complaint alleged that American's employment policy of terminating the employment of stewardesses who became pregnant and gave birth to a child (the "Injured Class") violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e)-2) (the "1970

case"). The jurisdiction of the district court was based on 28 U.S.C. §1331.

On March 17, 1972, the late Judge Sam Perry, over the objection of several members of the Injured Class, approved a settlement agreement between ALSSA and American in the 1970 case (the "1972 Agreement"). The 1972 Agreement provided for the re-hiring of members of the Injured Class but did not provide for either back-pay or full retroactive credit for length of service or seniority. In 1973, the Court of Appeals for the Seventh Circuit reversed Judge Perry's approval of the 1972 Agreement on the ground that ALSSA was not an adequate representative of the Injured Class.*

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* Air Line Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc., 490 F.2d 636, 640-642 (7th Cir. 1973) cert. denied sub nom. Air Line Stewards and Stewardesses Association, Local 550 v. Zipes, 416 U.S. 993 (1974).

In 1972, plaintiff, Darlene Preston (now Darlene Burmeister), a member of the Injured Class in the 1970 case, commenced a class action suit against American on substantially the same grounds as the 1970 case (the "1972 case"). In 1974, Darlene Burmeister also commenced a class action suit against ALSSA alleging that it had violated Title VII of the Civil Rights Act of 1964 ("the Civil Rights Act") by actively participating in American's discrimination against the Injured Class (the "1974 case").

On October 16, 1974, the district court certified Darlene Burmeister as an adequate class representative for a class consisting of all American stewardesses whose employment had been terminated between 1965 and 1970 because of their becoming pregnant and having children (the "Certified Class").

The Entry of Summary Judgment Against American

On November 18, 1974, the 1970, 1972 and 1974 cases were consolidated. On April 28, 1976, the district court, through the Honorable Judge Frank McGarr, entered summary judgment in this consolidated action against American on the issue of liability, holding that American's employment policy violated the Civil Rights Act.

The 1977 Settlement Agreement

Pending American's appeal of the district court's grant of summary judgment against it, on August 3, 1977, the parties entered into a written Settlement Agreement (the "1977 Agreement"). Under the 1977 Agreement, American agreed, inter alia, to re-employ all members of the Certified Class who applied for re-employment. In Section V(A) of the 1977 Agreement, the parties specifically agreed that:

> "Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period."*

Notice of the 1977 Agreement (the "Notice") was approved by the district court and mailed to all members of the Certified Class pursuant to Fed.R.Civ.P. 23(e). The stated purpose of the Notice was to inform members of the Certified Class of the terms of the 1977 Agreement and that on October 3, 1977, a hearing would be held to determine whether the 1977 Agreement should be approved. In paragraph 2 of the Notice, the parties described the 1977 Agreement as follows:

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* "Compensation period" is defined in Section I of the 1977 Agreement as "the period of time which commenced upon the termination of a class member's employment and ends on the date on which an order is entered approving this settlement."

> "Each re-employed class member will be restored to full seniority and credit for length of service, including such seniority and credit for the time since her employment was terminated ... The seniority thus computed will apply for all purposes ..."

On October 3, 1977, the district court, again through Judge McGarr, conducted a hearing on the fairness of the 1977 Agreement. On October 4, 1977, Judge McGarr issued an order approving the 1977 Agreement and dismissing the consolidated action. At least 120 members of the Certified Class, including Darlene Burmeister (hereinafter collectively referred to as the "Returning Mothers"), were later re-employed by American under the terms and conditions of the 1977 Agreement.

The Returning Mothers Were Denied Benefits Under American's Retirement Plan

At all times since their re-employment, it is undisputed that, for purposes for calculating their qualifications and benefits

under American's Retirement Benefit Plan (the "Retirement Plan"), American has refused to grant the Returning Mothers "credited service"* for their length of service with American prior to the date on which their employment was illegally terminated and during the compensation period.

The Returning Mothers' Motion In The District Court

On December 28, 1982, the Returning Mothers filed in the district court their "Motion to Order Specific Performance of Settlement Agreement, or in the Alternative, to Vacate Order Dismissing Cases" (the "Motion"). The Motion requested the district court: (1) to grant the Returning Mothers retroactive credit for their length of service with American for purposes of

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* "Credited service" is the operative term used in the Retirement Plan and is defined essentially as the total length of employment with American for which each participating employee receives corresponding retirement benefits.

qualifying, vesting and calculating their benefits under the Retirement Plan as provided in the 1977 Agreement; or, in the alternative, (2) to vacate the Order dismissing the consolidated action because, in violation of the due process clause and Fed.R.Civ.P. 23(e), the Notice mislead the Returning Mothers as to the actual benefits they were to receive under the 1977 Agreement.

American answered the Motion by filing its "Response to Preston Motion for Specific Performance" in which American admitted all the material factual allegations of the Motion. American simply denied that the 1977 Agreement included retroactive credited service under the Retirement Plan. Thereafter, no discovery was conducted and no evidentiary hearing was held. Rather, the Motion was briefed by the parties, each party primarily contending that the 1977

Agreement was clear and unambiguous on its face and supported its respective position.

The District Court's Order Of May 20

On May 20, 1983, the district court, through Judge McGarr, issued a written Memorandum Opinion and Order (the "May 20 Order"). The May 20 Order granted the Motion to the extent it requested specific performance. The district court did not pass upon the alternative motion to vacate and therefore it did not adjudicate any of the factual or legal issues raised therein.

In granting specific performance, the district court ordered American to provide the Returning Mothers with full retroactive credit for length of service for purposes of qualifying, vesting and calculating their benefits under the Retirement Plan. The district court predicated its decision primarily on its conclusion that the 1977 Agreement was clear and unambiguous and

expressly included the retirement benefits at issue (App., p. 26a). Because the district court ruled that the terms of the 1977 Agreement were clear and unambiguous, it did not review any extrinsic evidence of record or enter any findings of fact.

The Decision Of The Court Of Appeals

On June 7, 1985, the Court of Appeals for the Seventh Circuit reversed the May 20 Order (the "June 7 Decision"). In the June 7 Decision, the court of appeals first held that the district court erred in finding that the 1977 Agreement was clear and unambiguous with respect to retirement benefits (App., p. 6a). In so holding, the court of appeals paid no deference whatsoever to Judge McGarr's interpretation of the 1977 Agreement. Rather, the court of appeals ignored Judge McGarr's interpretation and held that the 1977 Agreement was ambiguous and that an examination of extrinsic evi-

dence was necessary to ascertain its true meaning (Id.).

Instead of stopping there and remanding the case to the district court for an evidentiary hearing, the court of appeals then embarked on its own detailed and elaborate examination of the incomplete extrinsic evidence in the record. It did so de novo and made numerous factual findings to support its conclusion that the provision in the 1977 Agreement for "credited with ... length of service" did not include retroactive "credited service" under the Retirement Plan (App., pp. 6a-21a). The court of appeals also examined the same incomplete extrinsic evidence de novo and again made numerous factual findings to support its conclusion that the Returning Mothers' alternative motion to vacate, a motion never considered by the district court, should be denied on its factual merits (App., pp. 21a-22a).

Accordingly, the court of appeals not only reversed the May 20 Order but it also remanded the cause to the district court with a direction essentially to enter judgment on behalf of American.*

ARGUMENT

I. This Court Should Review The Decision Of The Court Of Appeals Because It Improperly Decided Issues Of Fact De Novo And On The Basis Of An Incomplete Evidentiary Record.

The court of appeals held that the district court erred in finding that the disputed language in the 1977 Agreement was clear and unambiguous (App., p. 6a). Instead of stopping there and remanding the case to the district court for an evidentiary hearing, the court of appeals proceeded to make its own factual determinations de novo and concluded that the 1977

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*Specifically, the Court of Appeals reversed and remanded with directions to the district court to deny the motion for specific performance and to deny the alternative motion to vacate (App., p. 23a).

Agreement did not entitle the Returning Mothers to receive retroactive credited service under the Retirement Plan. The June 7 Decision should be reviewed by this Court because: (a) it is in direct conflict with applicable decisions of this Court; and (b) it represents such a dramatic departure from the accepted and usual course of judicial proceedings that the exercise of this Court's power of supervision is mandated.

A. The Court Of Appeals' Decision Is In Direct Conflict With The Recent Decision Of This Court In Anderson v. City Of Bessemer.

This Court recently defined the limited scope of an appellate court's power of review in Anderson v. City of Bessemer, __ U.S. __, 105 S.Ct. 1504 (1985). In reviewing the extrinsic evidence of record de novo, the court of appeals completely disregarded this Court's decision in Anderson.

In Anderson, after a bench trial, the district court had found that the plaintiff

Anderson had been denied a job by the defendant City on account of her sex. The Court of Appeals for the Fourth Circuit reversed. It did so primarily on the basis of its own review of the evidence and its own factual determinations based on that review. This Court held that this type of review by the court of appeals was improper and reversed.

The lynchpin of this Court's decision was its finding that the Fourth Circuit improperly exceeded its power in conducting its independent review of the evidence of record. In language directly applicable here, this Court stated as follows:

> "'[A]ppellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969)." 105 S.Ct. at 1512.

In the June 7 Decision, the court of appeals recognized the decision in Anderson,

but attempted to skirt its holding by ineffectively attempting to distinguish the instant case (App., p. 7a, n. 5). The court of appeals stated that this Court's admonition in Anderson was not applicable here because the district court in the instant case never made any findings of fact. As a result, the court of appeals improperly concluded that it was free to conduct its own review of the evidence de novo and, based on that review, make its own findings of fact.

The purported distinction between the Anderson case and the instant case is really no distinction at all or, in any event, is a distinction without any substantive difference. If the June 7 Decision is permitted to stand, it will effectively turn this Court's prior decision in Anderson literally on its head, and seriously undermine the future role of the trial judge as the trier of fact.

The rationale underlying this Court's holding in Anderson was cogently enunciated for the Court by Justice White who stated:

> "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." 105 S.Ct. at 1512.

Accordingly, the main thrust of this Court's decision in Anderson was that even where a court of appeals appears to be in as good a position as the district court to make factual determinations, it should still refrain from doing so. Plainly, the experience and expertise which lies in the district court is not to be usurped.

Indeed, the result reached in Anderson is even more compelling here -- where the court of appeals did not, as in Anderson, simply disagree with the trial judge's findings, but pre-empted the trial judge's function by entering its own findings and thereby precluding the trial judge from ever

making any findings of fact. In the process, the June 7 Decision has stripped the district court of its primary function in direct contravention of this Court's decision in Anderson.

B. This Court Should Exercise Its Supervisory Power Here Because The Court of Appeals Has Dramatically Departed From The Accepted And Usual Course Of Judicial Proceedings.

No principle of appellate review is more firmly established than the principle that an appellate court will not examine evidence in the record de novo. As noted above, this principle was recently reaffirmed by this Court in Anderson v. City of Bessemer.* The June 7 Decision directly

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* Indeed, the Court of Appeals for the Seventh Circuit had, previous to its decision in this case, also consistently adhered to this legal maxim. E.g., Continental Group, Inc. v. Lincoln Land Moving and Storage, Inc., 710 F.2d 368, 373 (7th Cir. 1983); Wyant v. J. I. Case Company, Inc., 633 F.2d 1254, 1256 (7th Cir. 1980); Barnes v. St. Catherine's Hospital, 563 F.2d 324, 329 (7th Cir. 1977); Denofre v. Transportation Insurance Rating Bureau, 532 F.2d 43 (7th Cir. 1976); Leonteos v. Haase, 410 F.2d 633, 637 (7th Cir. 1969).

contravened this Court's holding in Anderson, and in the process, so radically departed from the accepted and usual course of appellate procedure that this Court should exercise its supervisory power to correct the untold damage caused thereby.

After concluding that the 1977 Agreement was ambiguous and that an interpretation of the provisions at issue involved questions of fact, the court of appeals should have remanded the cause to the district court with instructions to conduct an evidentiary hearing and enter findings of fact. But the court of appeals refused to do so and proceeded to violate the mandate of Anderson by conducting its own de novo review of the facts of record and by reaching its own conclusion as to what the parties intended in the 1977 Agreement.

Moreover, the court of appeals significantly compounded these errors by making its

de novo review of the evidence on the basis of a totally incomplete evidentiary record. Because the parties had each maintained in the district court that the meaning of the language at issue was clear and unambiguous, neither party initiated discovery; no testimony was adduced; and no documents were produced. In addition, at no time did either party represent or in any manner indicate to the district court, or to the court of appeals, that the limited evidence in the record (i.e., certain limited documents and affidavits attached to the pleadings) constituted all the relevant extrinsic evidence necessary for deciding the factual issues present in the Motion. Nevertheless, the court of appeals made the wholly unwarranted assumption, without any support in the record whatsoever, that "the parties ... have submitted to us all the extrinsic evidence that they have" (App., p. 6a) (emphasis added).

The June 7 Decision, if allowed to stand, precludes the Returning Mothers from adducing additional evidence probative of the intention of the parties and dissecting what the court of appeals has now found to be ambiguous language in §V(A) of the 1977 Agreement. We submit that a wealth of extrinsic evidence potentially exists relevant to the issue (now raised by the court of appeals) as to what the parties intended by the insertion of the disputed language in §V(A) of the 1977 Agreement. Indeed, the court of appeals itself conceded this fact when it stated that:

> "In principle, we could consider other forms of extrinsic evidence as well, but we have found nothing useful in the record." (App., p. 8a, n. 7).

Finally, the process employed by the court of appeals in reviewing the extrinsic evidence of record was, by necessity, imprecise and conjectural. For example, many of

the factual determinations which it made were predicated upon voids in the evidentiary record -- each one of which was construed against the Returning Mothers. As an illustration, the exact import of the term "credited with ... length of service" in §V(A) was the key issue to be decided. Yet, the court of appeals could not, based on the limited evidence of record before it, differentiate between the term "length of service" and the terms "company seniority" and "occupational seniority" as those terms appear in §V of the 1977 Agreement (App., pp. 11a-13a). Further, since the court of appeals was unable to ascribe any definitive meaning to the term "length of service," it openly admitted "we are puzzled as to its significance" (App., p. 13a). Since the meaning of this term was the central issue in American's appeal, it should not have been decided out of such confusion, bafflement or "puzzlement."

The court of appeals also conceded that while the parties must have "intended for that credit [for length of service] to have beneficial consequences of some sort for the re-employed class members," the term "appears to be an idle wheel" (Id.). Nonetheless, despite its admitted perplexity over what the parties intended by the use of this term, the court of appeals proceeded to conclude definitively and with finality that the term did not include "credited service" within the meaning of American's Retirement Plan.

The court of appeals' analysis of the limited evidence of record brings into sharp focus the impropriety of its de novo review of the incomplete record before it. The Returning Mothers never had an opportunity to conduct discovery or to present evidence at a hearing. Plainly, if discovery were permitted and an evidentiary hearing conducted,

these crucial issues could be fully and fairly explored and a logical and well-reasoned interpretation of them could be made. As it stands now, in its rush to finality, the court of appeals improperly construed any doubt as to the meaning and significance of the disputed language in the 1977 Agreement against the Returning Mothers.

To summarize, the court of appeals not only made factual findings de novo in direct contravention of the mandate of this Court, but it also made these findings on the basis of an incomplete and entirely undeveloped evidentiary record. This is simply too slender a reed to support a conclusion that deprives many women of significant employment benefits.* Under these circumstances,

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* American estimated that it would presently cost approximately $850,000 to fund the retirement benefits actuarially attributable to the credits for length of service sought by the Returning Mothers (App., p. 18). Thus, although it cannot be stated with exact certainty, at issue here are millions of dollars in future pension benefits.

it is imperative that this Court grant review of the decision of the Court of Appeals.

II. In Order To Insure The Finality Of Class Action Settlements, This Court Should Review This Case And Establish The Appropriate Standard Of Review Which Courts Of Appeal Should Apply In Reviewing A District Court's Interpretation Of Its Own Class Action Settlement.

Judge McGarr had initially approved the 1977 Agreement pursuant to Fed.R.Civ.P. 23(e). In reversing Judge McGarr's May 20 Order, the court of appeals applied a de novo standard of review (App., p. 4a) and rejected outright Judge McGarr's interpretation of the 1977 Agreement. In the process, the court of appeals accorded no weight whatsoever to Judge McGarr's interpretation -- even though he had reviewed the 1977 Agreement and had supervised its approval and implementation.

Given the fact that federal dockets are crowded with numerous class actions and

given the strong public and judicial policy of encouraging settlements of such suits, it is crucial that the finality of class action settlements be established by this Court through its definition of the proper standard governing courts of appeal in their review of a district court's interpretation of its own class action settlement.

Lest it be forgotten, it was Judge McGarr who, as he was required to do under Fed.R.Civ.P. 23(e), reviewed, assessed and approved the terms of the 1977 Agreement. Accordingly, who, other than Judge McGarr, was and is better qualified to ascertain the true meaning of the 1977 Agreement? We suggest no one. Now that an interpretation of certain of the terms in the 1977 Agreement are at issue, the court of appeals should, at the bare minimum, have given substantial deference to Judge McGarr's interpretation of those disputed terms. To hold otherwise,

as the court of appeals plainly did here, seriously undermines and trivializes the approval process outlined by Fed.R.Civ.P. 23(e).

Moreover, the interests of judicial economy are not well served by the June 7 Decision. For, the court of appeals has effectively undermined the future finality of class action settlements and, in the process, encouraged dissident class members and other objectors (like American) to appeal from court approved class action settlements.

Therefore, this Court should review the decision of the court of appeals and establish once and for all the proper standard which governs the review by courts of appeal of class action settlements approved under Fed.R.Civ.P. 23(e).

III. This Court Should Review The Decision Of The Court Of Appeals Because It Improperly Adjudicated The Returning Mothers' Alternative Motion To Vacate.

The court of appeals not only reversed the district court's order of specific performance, it also proceeded to adjudicate the Returning Mothers' alternative motion to vacate. The court of appeals did so notwithstanding the following: (a) the district court had not even considered the alternative motion to vacate; and (b) adjudication of the alternative motion to vacate, by necessity, required a determination of certain issues of fact.

Review should be granted in this case because: (a) the decision of the court of appeals is in direct conflict with applicable decisions of this Court; (b) the decision is in conflict with a decision of another court of appeals on the very same issue; and (c) the court of appeals has so

far departed from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision.

A. The Court Of Appeals' Adjudication Of The Returning Mothers' Alternative Motion To Vacate On The Merits Conflicts With Several Decisions Of This Court.

In Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970) and Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 468 (1947), this Court squarely held that a court of appeals should not consider for review issues not reached by the lower court. The court of appeals in the instant case completely disregarded these decisions by adjudicating the Returning Mothers' alternative motion to vacate on the merits.

As noted above, the district court granted the Returning Mothers' motion for specific performance and never reached the factual and legal issues raised in their

alternative motion to vacate. The court of appeals reversed the order of specific performance. However, instead of stopping there and remanding the case to the district court for an evidentiary hearing and the entry of findings of fact on the alternative motion to vacate, the court of appeals proceeded to adjudicate the merits of that motion. The court of appeals' action in this regard was in flagrant contravention of the mandate of this Court in Dandridge and Flowers.

B. The Court Of Appeals' Adjudication Of The Returning Mothers' Alternative Motion To Vacate On The Merits Directly Conflicts With A Decision Of The Court Of Appeals For The Second Circuit On The Very Same Issue.

In Securities Investor Protection Corp. v. Morgan, Kennedy & Co., Inc., 533 F.2d 1314 (2d Cir. 1976), the Court of Appeals for the Second Circuit refused to consider on appeal an issue which had not been fully

adjudicated by the lower court. In language directly on point here, the Court there held as follows:

> "The Supreme Court has cautioned against the consideration, on review, of issues not reached by the lower court and not adequately presented in the reviewing tribunal. Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970) [parallel citations omitted]; Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 468 (1947) [parallel citations omitted]. Where, as here, there may be a need for findings of fact before a decision can be rendered, that caution takes on an added dimension." 533 F.2d at 1322. (Emphasis added).

Here, the court of appeals' decision to deny the motion to vacate was predicated upon its factual determinations that: (1) members of the Certified Class were not mislead by the Notice advising them of the terms and conditions of the 1977 Agreement; and (2) no class member other than the class representative would have objected to the 1977 Agreement if that Notice had stated that retirement benefits were specifically

excluded (App., pp. 21a-22a). Clearly, if the court of appeals had followed the decision in Morgan, Kennedy, it would not have adjudicated the Returning Mothers' alternative motion to vacate.

Obviously, the Court of Appeals for the Seventh Circuit and the Court of Appeals for the Second Circuit are in direct conflict on this important issue.

C. This Court Should Exercise Its Supervisory Power Here Because The Court Of Appeals Has Significantly Departed From The Accepted And Usual Course Of Judicial Proceedings.

Finally, the decision of the court of appeals represents a radical departure from the accepted and usual course of judicial proceedings. As noted above, this Court has repeatedly held that issues not decided by the lower court should not be considered by the reviewing tribunal and appellate courts should not make factual determinations de novo. Nevertheless, in adjudicating the

alternative motion to vacate, the court of appeals violated both of these fundamental principles.

In addition, the court of appeals decided these factual issues in an evidentiary vacuum. The Returning Mothers never had an opportunity to present evidence that they were mislead by the Notice and Darlene Burmeister, the representative of the Certified Class, never had a chance to explain fully the circumstances surrounding the negotiation, execution and interpretation of the 1977 Agreement. Accordingly, unless this Court grants review in this case, the Returning Mothers will not only have been deprived of substantial retirement benefits, they will have lost them without any evidentiary hearing or any effective right of review. Such a result is unfair, inequitable, and a violation of the Returning Mothers' right to due process.

This is a particularly egregious result since the only basis for the refusal of the court of appeals to remand the case for a determination on its merits was its stated desire to "put the question of retroactive retirement credits under the settlement agreement finally to rest" (App., p. 22a, n. 24). Yet, if the June 7 Decision is allowed to stand, the Returning Mothers will be forever foreclosed from a full and fair hearing on their right to receive employment benefits worth millions of dollars. The concern of the court of appeals for judicial economy, while commendable, cannot justify the resultant deprivation to the Returning Mothers of valuable property rights without any form of hearing.

CONCLUSION

For the reasons stated above, petitioners respectfully request that this Court either: 1) issue a writ of certiorari to the

United States Court of Appeals for the Seventh Circuit to review its decision in this case; or 2) enter a summary reversal and remand to the court of appeals with directions that the case be remanded to the district court with instructions to permit discovery, to conduct an evidentiary hearing and to enter findings of fact with respect to the issues raised in the motion for specific performance and in the alternative motion to vacate.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1073

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,

Plaintiffs-Appellees,

v.

AMERICAN AIRLINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70 C 2069—Frank J. McGarr, *Chief Judge.*

ARGUED OCTOBER 5, 1984—DECIDED JUNE 7, 1985

Before CUMMINGS, *Chief Judge,* and WOOD and ESCHBACH, *Circuit Judges.*

ESCHBACH, *Circuit Judge.* American Airlines appeals an order of the district court directing it to give retroactive retirement credit to all flight attendants who have returned to work in accordance with the provisions of a 1977 settlement agreement, and who desire to participate in its retirement plan. The district court held that the settlement agreement requires American Airlines to give such retroactive retirement credit. We must decide whether the district court's interpretation of the settlement agreement is correct. We reverse.

I

Until October 1970 it was the practice of defendant/appellant American Airlines, Inc. ("American") to

terminate flight attendants who became pregnant. In 1972 plaintiff/appellee Darlene Burmeister (then Preston), one of the flight attendants terminated, commenced a class action against American, charging that the practice violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.[1] In 1976 the district court entered summary judgment against American on the issue of liability. On August 3, 1977, while American's appeal was pending, the parties entered into a written settlement agreement (the "Settlement Agreement"), which provided in essence that (1) a pro rata share of the remainder of $2,700,000, after court awards for litigation expenses, costs, and attorneys' fees were deducted, would be paid to each class member; (2) American would re-employ all class members who applied and met various requirements; and (3) all returning class members would receive the amount of company and occupational seniority and credit for length of service that they would have received if American had not terminated their employment. The district court approved the settlement in October 1977 and dismissed the class action.

On January 3, 1983, Burmeister filed a motion in the district court seeking specific performance of the Settlement Agreement. In particular, she asked the district court to direct American to provide retroactive retirement credits to class members re-employed under the Settlement Agreement. In the alternative, she asked the court to vacate its order approving the Settlement Agreement, so that the litigation might continue. On May 20, 1983, the district court granted the motion for specific performance, holding that according to the clear and

[1] We omit parts of the history of the case not essential to the understanding of this appeal. For further details see *Airline Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir.) (per curiam), *cert. denied*, 439 U.S. 876 (1978). Though named in the caption, Air Line Stewards and Stewardesses Association, Local 550, is not a party in this appeal.

unambiguous terms of the agreement, "plaintiff and the returning class members are entitled to receive any and all of the benefits they would have received had they not been discharged by American." On May 31, 1983, American moved under Rule 59(e) of the Federal Rules of Civil Procedure for reconsideration of the May 20 order. The district court denied the motion.

American appeals from the May 20 order of specific performance and the subsequent denial of its Rule 59(e) motion. Our disposition of the appeal from the May 20 order renders the second matter moot, and we do not reach the issues raised in it.

II

The issue presented to us is whether the Settlement Agreement requires American to give retroactive retirement credit to class members who returned to work in accordance with its terms. The parties agree that the answer hinges on the meaning of the following provision in section V of the Settlement Agreement, entitled "Seniority and Credit for Length of Service":

> A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period [the period between termination and approval of the Settlement Agreement], except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise.

Thus we are presented with a question of contract interpretation. The interpretation of settlement agreements is governed by principles of state law applicable to contracts generally. *See Air Line Stewards and Stewardesses Assoc., Local 550 v. Trans World Airlines, Inc.*, 713 F.2d 319, 321 (7th Cir. 1983) (quoting *Florida Education Association,*

Inc. v. Atkinson, 481 F.2d 662, 663 (5th Cir. 1973)). The Settlement Agreement contains no choice of law clause; we thus follow the district court in looking to Illinois law for applicable principles of contract construction.

A. The Ambiguity of the Settlement Agreement

The primary object in construing a contract is to give effect to the intention of the parties. *Schek v. Chicago Transit Authority*, 42 Ill. 2d 362, 364, 247 N.E.2d 886, 888 (1969). The starting point is the Settlement Agreement itself; if the language of the Settlement Agreement clearly and unambiguously determines an answer to the question at issue, then the inquiry is over. *See J.R. Watkins Co. v. Salyers*, 384 Ill. 369, 373, 51 N.E.2d 574, 576 (1943). Whether a contract is ambiguous is a conclusion of law, reviewed de novo. *National Tea Co. v. American National Bank & Trust Co.*, 100 Ill. App. 3d 1046, 1049, 427 N.E.2d 806, 808 (1981). If the trial court holds that the contract is unambiguous, it must then go on to declare the meaning, and its declaration is likewise a conclusion of law, reviewed de novo. *See Hagerty, Lockenvitz, Ginzkey & Associates v. Ginzkey*, 85 Ill. App. 3d 640, 641, 406 N.E.2d 1145, 1146 (1980). But if the trial court holds that the contract is ambiguous, the meaning becomes a question of fact to be submitted to the trier of fact. *Id.* at 642, 406 N.E.2d at 1146. The trier of fact considers not only the language of the contract but also any extrinsic or parol evidence presented by the parties. *See Fox v. Inter-State Assurance Co.*, 84 Ill. App. 3d 512, 515, 405 N.E.2d 873, 876 (1980). Its determination is a finding of fact and is reviewed as such.

In this case the district court held that the Settlement Agreement unambiguously provides retroactive retirement credit to returning class members; under the principles just outlined, our review of this conclusion is de novo. Reading section V A in the context of the entire agreement, as we must, *Martindell v. Lake Shore National Bank*, 15 Ill. 2d 272, 283, 154 N.E.2d 683, 689 (1958), we find that we are unable to determine solely from the

language of the Settlement Agreement whether section V A is intended to grant such credits. It does not expressly mention retroactive retirement credit at all. Credit for company seniority and length of service may include retroactive retirement credit by implication, but we cannot ascertain this from section V A or any other provision of the Settlement Agreement.[2] Indeed, while it is clear that the parties intended the express grant of company seniority and credit for length of service to have beneficial consequences for the re-employed class members, we cannot determine from the face of the agreement what any of those beneficial consequences might be. The terms "company seniority" and "length of service" are not defined in the Settlement Agreement, either expressly or by reference to another document. No documents are incorporated by reference into the Settlement Agreement. No clause in the Settlement Agreement identifies or defines the specific benefits that are to flow from the grant of company seniority and credit for length of service. The language of section V A is compatible with an intention to grant retroactive retirement credit and also compatible with an intention not to grant it. Neither intention is so clearly favored by the language that we can say as a matter of law that one and not the other is embodied in the Settlement Agreement.[3]

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[2] Section III of the Settlement Agreement outlines the structure of the entire settlement; later sections fill in details. Section III C says: "All re-employed class members shall have, be credited with and enjoy the amount of Seniority and Credit for Length of Service as provided in Section V hereof." This provision, which refers to section V for details, sheds no additional light on the meaning of section V with respect to the question at issue.

[3] Burmeister argues earnestly that we can determine from the clear and unambiguous language of the Settlement Agreement itself, without reference to any extrinsic evidence, that credit for length of service means Credited Service, a defined term of

(Footnote continued on following page)

We therefore hold that the district court erred in concluding as a matter of law that the Settlement Agreement unambiguously awards retroactive retirement credit to returning class members. The Settlement Agreement is ambiguous, and its meaning is a question of fact. Consequently extrinsic evidence may, and indeed must, be considered in determining its meaning.[4]

If we were to follow the general rule, we would end our opinion at this point and remand the case for findings of fact. There are, however, strong reasons for not following the general rule in this case. The parties have thoroughly briefed the issue before us and have submitted to us all the extrinsic evidence that they have. The evidence is entirely documentary; no determinations of the credibility of witnesses are required. We are in as good a position to evaluate this evidence as the district court. Our own survey of the evidence persuades us that it

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[3] *continued*

American's Retirement Benefit Plan. *See infra* pt. II B (iii). But without consulting the Retirement Benefit Plan we have no way of knowing that the term "Credited Service" occurs in it, or what the term means, or whether a grant of retroactive Credited Service would amount to a grant of retroactive retirement credit. Burmeister's own argument thus requires us to consider some extrinsic evidence.

[4] The Settlement Agreement contains an exclusivity clause as section XII, which reads as follows:

> Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this agreement.

To use extrinsic evidence to determine what rights and obligations arise under the Settlement Agreement is not to use it "to modify, change or diminish" those rights and obligations. Thus the exclusivity clause does not bar the use of extrinsic evidence for the purpose of inferring what the parties have agreed to.

compels one conclusion and that a contrary conclusion would be clearly erroneous. To remand the case would require yet a third round of argument in the district court, doubtless to be followed by a fourth round on appeal. When we know the inevitable outcome, it would be a waste of judicial resources and an undue burden on the parties for us to order a remand. Accordingly, we shall depart from the general rule and forgo a remand.[5]

B. The Extrinsic Documentary Evidence

Because the Settlement Agreement does not define "company seniority" and "length of service," it is highly likely that the parties intended for these terms to have the significance that they have in some other document or documents governing the relationships among American, the flight attendants, and their union, and that the parties viewed the reference of the two terms to these other documents as too obvious to require explicit mention.[6] Since we must interpret the Settlement Agreement in accordance with the intentions of the parties, and since we have determined that the Settlement Agreement is ambiguous, permitting us to consider extrinsic evidence, we shall adopt the following procedure: we shall examine the three principal documents that govern the relationships among American, the flight attendants, and their union—American's regulations, the collective bargaining agreement, and the retirement plan—as they were in effect on the date of the Settlement Agreement, in order to determine if the terms "company seniority" and

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[5] In *Anderson v. City of Bessemer City*, ____ U.S. ____, 105 S. Ct. 1504 (1985), the Supreme Court cautions courts of appeals against reviewing a lower court's findings of fact de novo, even when those findings are based on documentary evidence. This admonition does not apply to the present case, because the district court made no findings of fact.

[6] Needless to say, we deprecate this approach to the drafting of contracts. If the parties had troubled to state what is meant by "company seniority" and "length of service" or to incorporate definitions by reference to other documents, this case probably would not have arisen.

"length of service" can be traced to any of them, so as to permit plausible inferences as to the beneficial consequences for flight attendants that the parties intended to flow from section V A.[7] In the light of our results we shall then consider the merit of the proposition that section V A grants retroactive retirement credit to reemployed class members.

(i) American's Regulations

In section 120-8 of the Regulations of American Airlines[8] we find three types of seniority defined: Company, Occupational, and Classification.[9] Company Seniority is "accredited service with the Company in any job classification." The "Company Seniority Date" is the date of employment by American or by a subsidiary or predecessor company, subject to adjustment for periods of inactive status. The Company Seniority Date determines the length of "accredited service" with American and is the basis for determining an employee's eligibility for length of vacation, vacation termination pay, leaves of

[7] The record contains a complete copy only of the Retirement Plan; our examination of the Regulations and collective bargaining agreement is confined to the parts in the record. In principle, we could consider other forms of extrinsic evidence as well, but we have found nothing useful in the record.

[8] The copy of this regulation contained in the record bears a date of 1982, and we are not certain that the same regulation has been in effect without amendment since 1977. Neither party has objected to the inclusion of a 1982 regulation in the record, although certain difficulties do arise. *See infra* p. 20.

[9] "Occupational Seniority" is accredited service in any particular "family" or "title group" under a labor agreement and applies only to employees covered by labor agreements. The term "seniority" as used in labor agreements with American, means "Occupational Seniority," unless the agreement specifies otherwise. "Classification Seniority" is accredited service in a particular job classification under a labor agreement or in Agent or Clerical/Other job classification under the Non-Management Salaried Pay Plan.

absence, initial sick leave, jury duty pay, travel, length of service awards, retirement benefits,[10] and long-term disability insurance. "Accredited service," we take it, is the period of time from the Company Seniority Date (adjusted for discontinuities of service) to the date of termination or to the present. "Company Seniority" appears to be nothing more than accredited service. The term "length of service" does not appear in the regulation, and we see no basis for inferring that "length of service" (as used in the Settlement Agreement) means accredited service.

(ii) **The Collective Bargaining Agreement**

The collective bargaining agreement between American and its flight attendants in effect in 1977 (the "CBA") defines "Service" as "the period of time assigned to active duty as a flight attendant with the Company unless otherwise specified." CBA art. 2(d). In Article 3, on compensation, we read: "For each full month of service, a flight attendant shall receive a base pay amount in accordance with his or her length of service as a flight attendant as follows: [table omitted]." The term "length of service" is not defined, but perhaps it need not be. If "service" is used as defined, then "length of service" would appear to mean, *ex vi termini*, the sum of all periods of service. Length of service also figures in the determination of incentive pay, apparently for overtime work, for which a separate table is provided.

In Article 9, entitled "Seniority General," we read: "Seniority as a flight attendant shall be based on the length of service as a flight attendant . . . ." Under the Regulations, *see supra* note 9 and accompanying text, this means Occupational Seniority, not Company Seniority.

Article 14, entitled "Transfer to Non-Flying or Supervisory Duties," provides that a flight attendant transferred to supervisory or other non-flying duties "shall

[10] On the inclusion of retirement benefits in this list, see *infra* p. 20.

retain and continue to accrue seniority and length of service credit for pay purposes for a period of one (1) year . . . ."

The generalization that we draw from these provisions is that length of service as a flight attendant determines a flight attendant's pay and Occupational Seniority.

(iii) **The Retirement Plan**

American's Retirement Benefit Plan for Flight Attendants, amended and restated as of January 1, 1976, (the "Retirement Plan"), was in effect in 1977. Under the plan, membership is voluntary; to be eligible, a flight attendant must be twenty-five years old and have completed a year of service. Members are required to make regular contributions to the plan,[11] and American is required to contribute the amounts necessary to fund the plan's obligations on a sound basis.

Roughly speaking, members are credited with one year of "Vesting Service" for each year they are credited with at least 386 Hours of Service, *see infra* note 12, after reaching age twenty-two. Members terminated with ten or more years of Vesting Service are entitled to a benefit on retirement; those with less than ten years of Vesting Service on termination of employment receive their own contributions back with interest.

Again speaking roughly, members are credited with one year of "Credited Service" for each year in which they are credited with at least 734 Hours of Service, *see infra* note 12, while both an employee and a member of the plan. Credited Service is a crucial factor in the determination of

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[11] In 1981 American agreed to an amendment of its collective bargaining agreement that changed the Retirement Plan to eliminate past and future contributions by the flight attendants. The amendment provided that previous employee contributions would be refunded to employees at work on September 1, 1981.

the amount of the retirement benefit to which a member is entitled.

Although fifty terms are expressly defined in the definitions article of the plan, neither "company seniority" nor "length of service" is among them. We have not been cited to, nor have we ourselves been able to find, any occurrences of these terms in the entire plan. We do find the expression "aggregate years of service." The definition is somewhat intricate and is set out in the margin.[12] The only significance of the aggregate years of service that we can find lies in the determination of the date of eligibility for readmission to the plan following a break in service.[13] Art. III, § 3.6.

C. "Length of Service" in Section V A

Our examination of the Settlement Agreement, American's Regulations, the CBA, and the Retirement Plan suggests some possible conclusions: (1) that the term "company seniority" as it appears in section V A of the Settlement Agreement means Company Seniority as defined in the Regulations, (2) that the term "length of service" as used in section V A means length of service as used in the CBA, and (3) that section V A's credit for length of service does not implicate the Retirement Plan

[12] An "Hour of Service" is any hour for which the employee is paid, whether for work performed or for vacation, holiday, etc. Art. II(z) (paraphrased). A "year of service" is any calendar year during which the employee is credited with 386 Hours of Service. The "aggregate years of service" are the number of years of service. Art. III, § 3.2 (paraphrased).

[13] If the break in service equals or exceeds the individual's aggregate years of service, then the prior service is disregarded and the individual is treated as a new employee. Otherwise, the individual becomes a member on the date on which he or she is first credited with an Hour of Service, *see supra* note 12, after termination, unless the date on which he or she would become a member without regard for this provision is later. Art. III, § 3.2 (paraphrased).

or provide retroactive retirement credit. But this is too hasty; a full reading of section V persuades us that (2), at least, is erroneous.

Section V comprises two subsections, A and B, more or less parallel. Subsection B grants to re-employed class members "full occupational (union) seniority and credit for length of service to the same extent as provided in Section V A . . . ," provided the union concurs in writing. If the union does not concur in writing, then "the amount of seniority and credit for length of service will be determined by the Court . . . ."[14] Occupational seniority is the second kind of seniority defined in the Regulations. *See supra* note 9. It determines priority of bidding for days off and flights and priority of layoffs and recalls. Section V is divided into two subsections apparently in order to provide the union with a veto over restoration of full occupational seniority and the corresponding length of service.[15] Occupational seniority is treated in the CBA and is apparently a subject of collective bargaining,

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[14] At the time the Settlement Agreement was approved, the Association of Professional Flight Attendants (APFA) had replaced the Air Line Stewards and Stewardesses Association as the exclusive bargaining representative for American's flight attendants. Section V B refers to APFA. Far from concurring in writing, APFA intervened in the proceeding below while the court was considering the Settlement Agreement, for the purpose of objecting to the Settlement Agreement's grant of retroactive occupational seniority to re-employed class members. APFA argued that such a measure would be an onerous burden on incumbent employees. The district court nevertheless approved the Settlement Agreement and in its order of October 4, 1977, expressly ordered that re-employed class members be restored to full occupational (union) seniority and credit for length of service as provided. The union appealed the order, and we affirmed. *Airline Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir.) (per curiam), *cert. denied*, 439 U.S. 876 (1978).

[15] This veto could be, and was, overridden by the court. *See supra* note 14.

whereas company seniority is apparently not. The length of service on which pay depends under the CBA is clearly length of service *as a flight attendant*, i.e., length of service in that occupation, rather than length of service with the company. CBA art. 2(d), 3(a). Since "length of service" in section V B occurs in tandem with "occupational (union) seniority," we think it likely that it means length of service in the occupation of flight attendant. In that case, a re-employed class member's pay will be determined by the length of service accorded to her under section V B, and not section V A. If "length of service" in section V B means length of service as a flight attendant, then "length of service" in section V A doubtless means length of service with the company. We think it is clear that they cannot mean the same thing, because the union is given a veto power over the Settlement Agreement's award of the one but not of the other. The length of service referred to in section V A appears to be beyond the reach of collective bargaining, just as company seniority is. But we are puzzled as to its significance.

One possibility, suggested by American, is that "length of service" in section V A means "accredited service" as defined in the Regulations. But this is highly implausible, because company seniority is nothing but accredited service with the company. On that reading, the phrase "company seniority and length of service" would be a pleonasm, like "triangle with three sides." Certainly the parties intended credit for "length of service" under section V A to be something in addition to credit for company seniority, and they intended for that credit to have beneficial consequences of some sort for the re-employed class members. But we have been unable to discover any independent significance for length of service with the company, as opposed to length of service as a flight attendant or company seniority. It appears to be an idle wheel.

D. Burmeister's Position

Burmeister contends that the credit for "length of service" in section V A is (or includes) a grant of retroactive retirement credit. In the absence of any straightforward explanation of the significance of the credit for length of service in section V A, this contention has some facial plausibility. At the least, it gives a function to an otherwise functionless term. Bringing retirement credits within the scope of section V A is not wholly arbitrary either; according to the Regulations, company seniority determines an employee's eligibility for retirement benefits.[16] Since the Retirement Plan is outside the scope of the CBA, if the Settlement Agreement was intended to give retroactive retirement credit, the grant would most likely have occurred in section V A.

In support of her position Burmeister argues that the close similarity between the terms "Credited Service" in the Retirement Plan and "credit for length of service" in section V A shows that section V A is intended to give re-employed class members retroactive Credited Service. She maintains further that this is the clear and unambiguous intent of section V A, when its terms are accorded their ordinary and natural meaning. She points out that the Notice to Class Members, on which the parties agreed, stated that each re-employed class member will be restored to full seniority and credit for length of service, which will apply *for all purposes*, and that American has in fact used the retroactive credit for seniority and length of service for the purpose of computing all employee benefits tied to seniority and length of service—with the sole exception of benefits under the Retirement Plan. Finally, she argues that she, as the named plaintiff, understood when she signed the Settlement Agreement that it included retroactive retirement benefits, and that she would not have signed it if she had believed that no such benefits had been included.

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[16] On this point, the Regulations do not appear to agree with the Retirement Plan. *See infra* p. 20.

E. Analysis

After considering all the arguments of the parties, we think that Burmeister's case is weak and that the reasons for not finding in section V A a grant of retroactive retirement credit are overpowering. Burmeister exaggerates the similarity of "Credited Service" and "credit for length of service." "Credited Service" is a defined term of the Retirement Plan that conspicuously does not appear in section V A. If "length of service" is given its ordinary and natural meaning, it certainly would not mean "Credited Service" under the Retirement Plan but simply the length of time the employee has been with the company.

Furthermore, if the parties had intended to allow for retroactive retirement credit, it is unlikely that they would have done so by a simple blanket extension of Credited Service to all re-employed class members for the entire compensation period. Participation in the Retirement Plan was voluntary, and according to the only evidence on the point that we find in the record, only one or two of the 120 re-employed class members had joined the Retirement Plan before termination.[11] Participation required more than an election to participate; members had to make regular contributions. In view of this it could hardly have been known to the negotiators of the Settlement Agreement that all the re-employed class members would want to participate or would have been able to make the required retroactive contributions.

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[11] The affidavit of Eva Chang, American's Manager of Pension Plan Administration, states on information and belief that "only one or two of the 120 returning class members had joined the Retirement Benefit Plan at the time of their initial employment with American Airlines." We interpret "at the time of their initial employment" to mean "before they were terminated for pregnancy." It cannot reasonably be taken to mean "at the time they were first hired," because participation in the Retirement Plan requires a year of service. While Burmeister draws our attention to the fact that Chang's statement was made on information and belief, she submitted no evidence to contradict or correct it.

If the parties had intended to accord retroactive retirement credits to re-employed class members, we think it highly likely that they would have mentioned the Retirement Plan or at least used distinctive terms like "retirement credit" or "Credited Service," and that they would have provided all re-employed class members the option of joining the plan or not, provided for the effective date of joining, and provided for the payment of back contributions so as to bring each member's account up to date. In view of the complexity and precision of the Retirement Plan, the value of rights under it, and the potential for continued confusion and controversy over details, we think it most unlikely that the parties, in providing for retroactive retirement credit, would have contented themselves with an oblique and uncertain reference to credit for "length of service," letting all the rest go. The language of section V A more readily supports the conclusion that the parties did not intend to include retroactive retirement credit in the Settlement Agreement.

The language in the Notice to Class Members[18] cannot be given controlling weight over the Settlement Agreement itself, and in any event it lends no support to Burmeister's position. The notice actually says only that "the seniority thus computed will apply for all purposes," for some reason leaving out length of service, but even if it is interpreted to mean that the length of service thus computed will also apply for all purposes, this can only mean for all purposes for which length of service is used.

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[18] The relevant part of the Notice to Class Members reads:

> Each re-employed Class Member will be restored to full seniority and credit for length of service, including such seniority and credit for the time since her employment was terminated, but without credit for time during which she was pregnant or otherwise disabled to work. The seniority thus computed will apply for all purposes, including choice of home base and pay.

But bare length of service is not used to compute any variable of significance in the Retirement Plan.[19]

The fact that American has used the re-employed class members' retroactive credit for seniority and length of service for the purpose of computing all employee benefits tied to seniority and length of service except for retirement benefits gives no support to Burmeister's position. The accrual of retirement benefits is not tied to seniority or to mere length of service, but to Vesting Service and Credited Service after one has joined the plan. Furthermore, we think it significant that the benefits that have been provided to re-employed class members in consequence of their retroactive seniority are all current benefits. For example, re-employed class members have not received credit for the paid vacation they would have earned if they had not been terminated; they have received only credit for the paid vacation they have earned after re-employment, based on their retroactively adjusted seniority. If the Settlement Agreement granted

[19] Since eligibility for membership in the Retirement Plan requires completion of a "year of service," it might be argued that the credit for "length of service" in section V A applies at least to this eligibility requirement. But that is by no means clear. The "year of service" required for eligibility is defined within the Retirement Plan in terms of "Hours of Service," also a defined term. *See supra* note 12. Hours of Service do not accumulate as "length of service" under the plan, but as "aggregate years of service." *See id.* If section V A had spoken of credit for "aggregate years of service," instead of "length of service," the implicit reference to the Retirement Plan would be reasonably clear. But "length of service" is a term foreign to the Retirement Plan, and we cannot say, without begging the question, that the parties intended that the re-employed class members should receive credit for "aggregate years of service" equal to the entire compensation period, a result that would apparently be compelled by the suggested reading of "length of service." Intuitively, a person might serve a year with the company, and thus have one year's "length of service," without fulfilling the number of Hours of Service requisite for a "year of service" under the Retirement Plan.

retroactive retirement credit to re-employed class members, American would be obligated to fund the retirement benefits actuarially attributable to those credits—an expenditure that American estimates at $850,000, or $86,500 a year for thirty years, almost a third of American's express monetary obligation under the Settlement Agreement.[20] Such an expenditure would be a retroactive benefit—American would have to pay what it would have paid if the re-employed class members had not been terminated and had all been members of the Retirement Plan. We think it unlikely that a uniquely retroactive benefit of such magnitude would have been buried so unobtrusively in the chosen language of section V A amidst other implied benefits that were wholly current, if the parties had really intended to create it.

In addition, we think that section III D of the Settlement Agreement was intended in part to prevent just such massive monetary obligations from being teased out of the language of the Settlement Agreement after it was signed and approved. In section III A, American agreed to pay $2,700,000 to the class, the only monetary obligation to the class members expressly set forth. Section III D reads as follows:

> American Airlines will have no monetary or other obligation to any member of the class or to any representative or attorney for the class unless expressly provided in this Agreement.

No obligation to fund retroactive retirement benefits is expressly provided in the Settlement Agreement, and section III D bars implied monetary obligations. Indeed, section III D provides a strong reason in itself to think that the parties did not intend to include retroactive

[20] This is what it would have cost American in 1981, taking into account the 1981 amendment to the Retirement Plan. *See supra* note 11. The record does not show what it would have cost American in 1977, but the figure would clearly have been substantial, although less.

retirement credit in the settlement. The parties knew the content of section III D and so would have realized that if the Settlement Agreement was to grant retroactive retirement credits, American's obligation to fund those credits would have to be set forth expressly in the agreement.

In an affidavit attached to her memorandum in support of her motion for specific performance below, Burmeister said the following:

> 6. In 1977, one of the counsel for plaintiffs informed me that a tentative settlement agreement ("the 1977 Agreement") had been reached with American. I had previously explained that retroactive credited service under the Retirement Plan must be included in the 1977 Agreement in order for it to be acceptable to me. I signed the 1977 Agreement having been assured and led to believe that it included these benefits.

In the same affidavit she also says:

> 10. Had I believed at the time I signed the 1977 Agreement that it did not provide for retroactive credited service under the Retirement Plan, I would not have signed it on behalf of myself or as a class representative.

If Burmeister had made her understanding clear to *American* before signing the Settlement Agreement, and if *American* assured her and led her to believe that it included retroactive Credited Service, then American might very well be bound by her understanding. But Burmeister conspicuously does not say that she explained to *American* how she understood section V A, or that *American* assured her and led her to believe that her understanding was correct. If she could have truthfully made such assertions, we presume that she would have. Any particular interpretation that only one of the parties may have envisioned at the time the contract was executed is immaterial. *Smith v. Vernon*, 6 Ill. App. 3d 434, 436, 286 N.E.2d 99, 101 (1972).

Finally, we consider the effect of section 120-8 of American's Regulations, dated November 24, 1982, which states:

> The Company Seniority Date determines the length of "accredited service" with the Company. It is the basis for determining an employee's eligibility for:
>
> . . . .
>
> Retirement Benefits (REG 160-1).

Since this section bears a date of 1982, the quoted passage may have been revised to reflect the 1981 changes to the Retirement Plan. *See supra* note 11. Thus we hesitate to treat it as straightforwardly applicable in 1977. It is insignificant that the passage speaks of "Company Seniority Date" rather than "Company Seniority"; length of accredited service *is* Company Seniority, and, as the passage says, length of accredited service is determined by Company Seniority Date. "Company Seniority" and "Company Seniority Date," though differently defined, appear to us to be functionally interchangeable. The passage refers us to another regulation, REG 160-1, which evidently contains more information. But the parties have not supplied us with REG 160-1, and we do not know what it says. The statement that Company Seniority Date is the basis for determining an employee's eligibility for retirement benefits conflicts with the clear provisions of the Retirement Plan as in effect in 1977, and we doubt that it is true. Article VI of the Retirement Plan, entitled "Eligibility for Benefits," does not make use of the terms "Company Seniority Date" or "Company Seniority," nor does it in any other way indicate that Company Seniority, as defined in the Regulations, plays any part in the determination of an employee's eligibility for benefits. Because of this discrepancy and the uncertain effectiveness of the quoted passage in 1977, we do not find the passage to be trustworthy evidence supporting Burmeister's position.

All of these considerations lead us to conclude, and we hold, that the Settlement Agreement does not provide

retroactive retirement credit to re-employed class members.

III

In her motion to the district court seeking specific performance of the Settlement Agreement, Burmeister moved in the alternative to vacate the order of October 4, 1977, approving the Settlement Agreement and dismissing the action, "to allow plaintiff to adjudicate fully her cause of action against defendant." Because the district court granted the motion for specific performance, it did not rule on the alternative motion. Thus it may appear that we must remand the case for such a ruling. After reviewing her motion and supporting memorandum, we have come to the conclusion that such a remand is unnecessary.

Burmeister's reason for seeking the vacation of the order is that the Notice to Class Members, *supra* note 18, misled them into believing that they would receive full retroactive credited service under the Retirement Plan. We assume without holding that inadequate notice of a proposed settlement in a class action may be sufficient grounds for vacating the order approving the settlement. *See Simer v. Rios*, 661 F.2d 655, 664 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982). But Burmeister submitted no evidence that the notice misled any class member into believing that the Settlement Agreement provided retroactive retirement credit to those re-employed, and no evidence that any class member (besides herself) would have objected to the settlement if the notice had stated explicitly that retroactive retirement credit was not included.[21]

[21] Burmeister's affidavit of March 18, 1983, states that after she was told in 1979 that she would not receive retroactive retirement credit, she contacted a re-employed class member, Peggy Allen, who engaged counsel to pursue the matter administratively. But the record contains no affidavit from Allen asserting that she was misled by the notice.

The language in the notice that Burmeister finds especially misleading is the statement: "The seniority thus computed will apply for all purposes . . . ." As we noted *supra*, the subject of this statement is *seniority*, which, at least in 1977, had nothing to do with the Retirement Plan. It is not seniority but *credit for length of service* that Burmeister consistently portrays as suggesting retroactive retirement credit, yet the statement says nothing about credit for length of service, even though the preceding sentence does.[23]

Furthermore, it appears that the vast majority of reemployed class members were not members of the Retirement Plan when they were terminated.[24] In order to believe on the basis of the notice that they were to receive retroactive retirement credits, such persons would have to infer that the Settlement Agreement retroactively inducted them into the Retirement Plan. It is clear to us that such an inference could not reasonably be based on the language of the notice, without further inquiry.

For these reasons, we hold that the notice to class members was not so misleading as to require the vacation of the order approving the settlement and dismissing the action.[25]

---

[23] We noted this anomaly *supra*, p. 16. A prudent class member might have inquired whether the omission of "credit for length of service" was deliberate, and if so, what it meant, but as far as we know, no one did.

[24] *See supra* note 17.

[25] Ordinarily we would not decide a motion addressed to but not acted on by the district court. In this case, however, we have before us all the briefs and evidence presented to the district court, and since we are in as good a position as the district court to decide the motion, we depart from our usual practice in the interest of judicial economy and put the question of retroactive retirement credits under the Settlement Agreement finally to rest.

IV

The judgment of the district court is reversed, and the case is remanded with directions to deny the plaintiff's motion for specific performance of the Settlement Agreement and her motion to vacate the order approving the Settlement Agreement.

SO ORDERED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—6-7-85—450

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

70 C 2069

MEMORANDUM OPINION AND ORDER

(Entered May 20, 1983)

On August 3, 1977, a settlement agreement was entered into between plaintiff and class representative Darlene Preston (now "Darlene Burmeister") and defendant American Airlines ("American"). Plaintiff contends that American has not fulfilled its obligations under the terms of the agreement because American has refused to allow plaintiff and the other class members who were re-employed under the terms of the settlement agreement ("returning class members") to fully participate in its Retirement Benefit Plan ("Plan"). Specifically, plaintiff avers that the returning class members should be allowed, in accordance with the provisions of the settlement agreement, to participate in the Plan on a retroactive basis, encompassing both the period of employment each returning class member worked for American prior to her termination, and the compensation period.[1]

The sequence of events which led to the parties' decisions to enter into the settlement agreement is briefly as follows. In 1970, the Air Line Stewards and Stewardesses Association, Local 550 ("ALSSA"), filed a complaint against American. In its complaint, ALSSA alleged that American had violated Title VII, 42 U.S.C. § 2000e-2, by terminating stewardesses who became pregnant and had children. In 1972, plaintiff filed a

[1] "Compensation period" is defined in the settlement agreement as "the period of time which commenced upon the termination of a class member's employment and ends on the date on which an order is entered approving this settlement." Settlement Agreement at 2.

class action on behalf of the stewardesses who became pregnant, had children, and were terminated by American. Once again, the cause of action was that American had violated Title VII. In 1974, the class was certified[2] and plaintiff became the class representative. Finally, in 1974, plaintiff filed a class action against ALSSA contending that it had actively participated in American's discrimination and had thereby violated Title VII. These three cases were eventually consolidated and on April 28, 1976, summary judgment was entered against American.

Pending American's appeal of that decision, the parties entered into the 1977 settlement agreement. The agreement, in essence, provides that: (1) a pro rata share of the remainder of $2,700,000, after court awards for litigation expenses, costs and attorneys' fees are deducted, will be paid to each certified class member; (2) American will re-employ all members of the certified class who apply and meet various requirements; and (3) all returning class members will receive the amount of company seniority and credit for length of service that should have been received had their employment not been terminated by American. In 1977, the settlement agreement was approved by court order and the consolidated case was dismissed.

Plaintiff has filed a motion asking the court to order specific performance of the settlement agreement, which would allow plaintiff and the returning class members to fully participate in the Retirement Benefit Plan or, in the alternative, to vacate the order dismissing the case. For the following reasons, plaintiff's motion seeking specific performance is granted.

The construction of a settlement agreement is to be governed in accordance with the principles of law which govern a contract. *Okonko* v. *Union Oil Co. of California,* 519 F. Supp. 372 (C. D. Cal. 1981); *see also United States* v. *Orr Construc-*

[2] The certified class was composed of stewardesses whose employment had been terminated between 1965 and 1970 because they had become pregnant and had children.

tion Co., 560 F. 2d 765 (7th Cir. 1977). The interpretation, construction, or legal effect of a contract are issues to be resolved by the court as questions of law. *Mazanek* v. *Rockford Drop Forge Co.*, 98 Ill. App. 3d 956, 424 N. E. 2d 1271 (1981). Further, when the terms of a contract are clear and unambiguous, no parol or extrinsic evidence can be considered to change the meaning of the terms. *Susmano* v. *Associated Internists of Chicago, Ltd.*, 97 Ill. App. 3d 215, 422 N. E. 2d 879 (1981). To determine whether ambiguity exists in the language of a contract, the instrument must be considered as a whole. Courts cannot consider some clauses and ignore other clauses. *Valerio* v. *R & R Construction Co.*, 20 Ill. App. 3d 48, 312 N. E. 2d 713 (1974).

In applying these rules to the 1977 settlement agreement, it is evident that the terms of the agreement are clear and unambiguous. The language is not "reasonably susceptible to more than one meaning." *Susmano*, at 219, 422 N. E. 2d at 882. According to the clear terms of the agreement, plaintiff and the returning class members are entitled to receive any and all of the benefits they would have received had they not been discharged by American.

Paragraph V of the settlement agreement is entitled "Seniority and Credit for Length of Service." The first sentence of this paragraph explicitly provides that "[e]ach re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period. . . ."

The Retirement Benefit Plan is one of the benefits American employees enjoy. In addition, the retirement benefits of the Plan are determined by the number of years an employee has worked for American. Clearly, the phrase "credited with . . . company seniority and length of service to which she was

entitled" means that plaintiff and the returning class members are entitled to the benefits of the Plan consistent with their credit for length of service.

At one time, in order to be eligible to receive the benefits of the Plan, employees were required to make yearly contributions to the Plan. If an employee's contribution were still a requirement, American would have to allow plaintiff and other returning class members the opportunity to make retroactive contributions to the Plan and thus participate in the Plan's benefits.

However, since 1980, a new version of the Plan has been in effect. This new Plan does not require employee contributions in order for an employee to be eligible to receive its benefits. In addition, in 1981, American agreed[3] to pay back to its employees all of the contributions previously paid into the Plan. As a result of these facts, plaintiff and the returning class members are no longer required to make contributions to the Plan in order to receive benefits based on credit for length of service.

Finally, the mandate found within paragraph VI of the settlement agreement that "American . . . will not discriminate in any way against any class member by virtue of the fact that she is a class member or adopt or enforce any employment practice, condition or qualification which operates to discriminate against any class member" buttresses the clear meaning of the terms of the agreement. In order to avoid discrimination, plaintiff and the returning class members must be awarded all of the benefits they would have received had they not been discharged. Clearly, the Plan is a part of those benefits.

In conclusion, plaintiff's motion for specific performance is granted. According to the terms of the settlement agreement, plaintiff and the returning class members who desire to partici-

---

[3] The agreement was between the Association of Professional Flight Attendants and American. Plaintiff and the returning class members are members of the Association.

pate in the Plan must be credited with their length of service during the compensation period and their time of employment with American prior to the compensation period, for purposes of qualifying, vesting and calculating benefits under the Plan. In addition, American must inform plaintiff and the returning class members of their rights to participate retroactively in the Plan.

ENTER:

/s/ Frank J. McGarr
UNITED STATES
DISTRICT JUDGE

DATED: May 20, 1983

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

August 15, 1985.

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, et al.,

Plaintiffs-Appellees,

No. 84-1073 vs.

AMERICAN AIRLINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 C 2069

Frank J. McGarr, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause by plaintiffs-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

CERTIFICATE OF SERVICE

I, Michael B. Roche, being first duly sworn upon oath, depose and state as follows:

1. I am a member of the Bar of this Court in good standing.

2. I caused to be deposited in the United States mailbox at 3100 Prudential Plaza, Chicago, Illinois, 60601, with first class postage prepaid, a sufficient number of copies of the "Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" in the lawsuit styled Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO, et al. v. American Airlines, Inc. This mailing occurred on Tuesday, November 12, 1985 at approximately 5:00 p.m. within the permitted time under 28 U.S.C. §2101(c).

3. At the same time and place, with first class postage prepaid, I caused to be served by mail three copies of said Petition on Gordon B. Nash, Jr., Esq., Counsel of Record for Respondent, American Airlines, Inc., at Gardner, Carton & Douglas, One First National Plaza, Chicago, Illinois, 60603.

Michael B. Roche

Subscribed and sworn to
before me this 12th day
of November, 1985.

Notary Public

Supreme Court, U.S.
FILED
DEC 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, Local 550, TWU, AFL-CIO, et al.
Petitioners,

vs.

AMERICAN AIRLINES, INC.,
Respondent.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. OPPOSING REVIEW

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, Local 550, TWU, AFL-CIO, et al.

Petitioners,

vs.

AMERICAN AIRLINES, INC.,

Respondent.

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC. OPPOSING REVIEW

The Court of Appeals decision that petitioners seek to review denies their claim that a settlement agreement, as they interpret it, entitles them to retroactive credits under American Airlines' Retirement Plan for Flight Attendants.[1] In rejecting

[1] American Airlines, Inc. is a subsidiary of AMR Corporation, and other subsidiaries of AMR Corporation are Flagship International Corporation, AMR Services Corporation, AMR Energy Corporation, and AA Training Corporation.

Petitioners, who number approximately 120 (Rec. App. 155), had been terminated by respondent as flight attendants during 1965 to 1970 and had returned to work in 1979 or later pursuant to the settlement agreement. They contend that the settlement agreement gave them retroactive retirement credits for the terminated years when they were not working for American and for the earlier years of employment. Only a few petitioners had been members of the contributory plan during their prior employment (*id.* 156).

(Footnote continued on following page)

petitioners' interpretation, the Court of Appeals thoroughly analyzed the relevant provisions of the settlement agreement and the retirement plan with other documents in the record. Petitioners do not attack the merits of the Court of Appeals decision in reversing the District Court's adoption of petitioners' interpretation. They contend, as indicated by the three questions the petition presents (Pet. 1), that the Court of Appeals' function as a court of review was too limited for it to interpret the settlement agreement. The Court of Appeals, they argue, should have remanded the case for evidentiary hearings and findings of fact. Considerations ignored by petitioners, which include the background of the litigation and their method of conducting this proceeding, show that the petition should be denied.

STATEMENT OF THE CASE

Significant facts are omitted or misapprehended in the petition's "Statement of the Case" and "Questions Presented."

The petition would prolong a litigation begun in August 1970.[2] The class action against respondent alleged that the airline's practice of terminating flight attendants on pregnancy

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(Footnote continued from preceding page)

Despite the contrary admonition in Supreme Court Rule 19.1, respondent has requested the printed record of the present motion proceeding, which is wholly documentary and comparatively short, to be sent to the Clerk of the Supreme Court. Respondent deems it important to show, as this answer explains, that petitioners' present contentions are inconsistent with their conduct of the proceeding on their motion. The references in this brief to "Rec. App." are to the printed appendix filed by respondent in the Court of Appeals.

[2] The length of time is evident from the fact that Mr. Justice Stevens sat on one of the earlier episodes of the litigation in 1973, *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (7th Cir. 1973), cert. den. 416 U.S. 993, and has recused himself in this court in later episodes. 439 U.S. 876; 454 U.S. 886, 960; 455 U.S. 382, 915, 932.

violated Title VII of the Civil Rights Act of 1964.[3] American abandoned the practice in October 1970. The litigation continued over claims for back pay, reinstatement, etc., by flight attendants terminated during 1965-1970. The American settlement agreement now involved, entered into in August 1977, was intended by all federal courts and all parties to terminate the litigation. The agreement stated expressly (Sec. II) that its purpose was to settle all claims that "have or might have been raised" under the pleadings (Rec. App. 9-10).

The key provision of the comprehensive settlement agreement (Rec. App. 8-28) was Section III (*id.* 10). Respondent

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[3] A companion class action against Trans World Airlines, Inc. (No. 70 C 2071) was filed on the same day as the action against American (No. 70 C 2069), and the cases were consolidated. The many appeals in the litigation, all in the Seventh Circuit, are summarized:

ALSSA v. *American Airlines, Inc.*, 455 F. 2d 101 (1972), held the EEOC was properly denied intervention in a proceeding to approve a 1972 settlement of both cases.

ALSSA v. *American Airlines, Inc.*, 490 F. 2d 636 (1973), *cert. den.* 416 U.S. 993, reversed a District Court approval of the 1972 settlement.

ALSSA v. *American Airlines, Inc.*, 573 F. 2d 960 (1978), *cert. den.* 439 U.S. 876, sustained District Court approval of the American 1977 settlement, at issue in this appeal.

In re Consolidated Proceedings in Airline Cases, 582 F. 2d 1142 (1978), sustained a summary judgment against TWA and held some class members had failed to comply with the Title VII time limit, which was held jurisdictional.

ALSSA v. *TWA*, 630 F. 2d 1164 (1980), affirmed District Court approval of later TWA settlement.

Zipes v. *TWA*, 455 U.S. 385 (1982), affirmed approval of TWA settlement and held Title VII time limit not jurisdictional.

Zipes v. *TWA*, (1983) No. 82-1889 (unpublished), interpreted TWA settlement contract.

Zipes v. *TWA*, 713 F. 2d 319 (Aug. 1983), interpreted TWA settlement contract.

Freedman v. *ALSSA*, 730 F. 2d 509 (1984), *cert. den.* 105 S. Ct. 167, interpreted TWA settlement contract.

there agreed to pay $2,700,000 to the class members (Clause A) and reemploy those ready and qualified to work (Clause B) with seniority and credit for length of service as provided elsewhere in the agreement (Clause C). Conversely, a limitation in Clause D stated that American had "no monetary or other obligation . . . unless expressly provided" in the agreement. These provisions were implemented by detailed terms in Sections IV (Calculation of Payments to Class Members), V (Seniority and Credit for Length of Service), and VI (Reemployment).

Petitioners through their then counsel sought and obtained approval of the agreement and dismissal of the three involved actions by a District Court order of October 4, 1977.[4] They obtained affirmance of the order in the Court of Appeals and the denial of certiorari here. *ALSSA* v. *American Airlines, Inc.*, 573 F. 2d 960, cert. den. 439 U.S. 876.[5]

MOTION PROCEEDING IN DISTRICT COURT

In early 1983 petitioners began the present proceeding through new counsel by filing a motion with two alternatives. The motion claimed that the settlement agreement granted them retroactive credits under respondent's Retirement Benefit Plan. The motion alternatively asked the court, if retirement credits were held not granted by the settlement, to vacate the 1977 order approving the settlement and dismissing the actions. The motion stated that it was made "pursuant to Rule

[4] Petitioners ignore the dismissal of the actions when they refer (p. 16) to their employment as "illegally terminated." The dismissal nullified the summary judgment of liability previously ordered by the District Court as well as respondent's then pending appeal therefrom. Appendix 1a, respondent's brief in Court of Appeals.

[5] The certiorari petition (p. 15) fails to indicate that the petitioners obtained this result in the Court of Appeals and successfully resisted certiorari.

60(b)(6), Fed. R. Civ. P."[6] The court was alleged to have jurisdiction over the motion pursuant to Section XIII of the agreement, which stated it was enforceable under the District Court's power to enforce its orders (Rec. App. 25). Respondent's answer to the motion admitted facts about the history of the litigation but denied the crucial allegations claiming retroactive retirement credits.[7]

Petitioners' contention was that retroactive retirement credits were granted to them by the clause in Section V A of the settlement agreement that each re-employed class member shall be "credited with the . . . length of service" to which she was entitled on termination and thereafter until the date of the agreement. The words "credited with the . . . length of service" were asserted to be the equivalent of the term "credited service" in respondent's retirement plan (Rec. App. 50). That was the substantive issue raised by petitioners' motion. Respondent denied this contention, saying that "credited service" was not used in the settlement agreement and that the term, as defined in the voluntary plan, required membership and contributions by flight attendants (*id.* 110).[8]

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[6] Rule 60 is quoted in Appendix A hereto.

[7] The petition (pp. 17-18) incorrectly says that respondent admitted all the material factual allegations of the motion and that it "primarily contended that the agreement was clear and unambiguous on its face." It was the petitioners who introduced the contention that the settlement agreement was "clear and unambiguous" and that nothing extrinsic could be considered (Rec. App. 51-2).

[8] The definition of "Credited Service" in the plan provided, "A Member's Credited Service shall not include any period for which he or she does not make Employee Contributions" (Rec. App. 164, 176). Similarly a booklet describing the plan for flight attendants explained, "*credited service* is the period of employment for which you have made contributions as a member of the Plan" (*id.* 68). The plan required every member to make contributions at certain percentages of compensation and American to contribute in such an amount as would, with employee contributions, fund the obligations of the plan

(Footnote continued on following page)

As explained further in the argument, the parties followed the usual contested motion practice in the District Court. An extensive record of memoranda, with affidavits and documents attached, was accumulated (Rec. App.: petitioners': 41-104, 123-38, 250-80; respondent's: 34-40, 105-22, 139-249, 281-323). There was no discovery by deposition or otherwise, no evidentiary or other hearings, no oral argument.

The District Court granted petitioners' motion to enforce the settlement (Memorandum Opinion and Order, Pet. App. 24a-28a). The opinion, citing decisions of the Appellate Courts of Illinois, the state in which the agreement was executed, adopted petitioners' contentions that the terms of the settlement agreement were "clear and unambiguous" and that extrinsic evidence could not be considered to "change the meaning." According to the "clear terms," the opinion said, the returning class members were entitled to "all of the benefits they would have received had they not been discharged by American."[9] The phrase "credited with the . . . length of service" in Section V A was held to mean that the returning class members were "entitled to the benefits of the Plan consistent with their credit for length of service." The opinion concluded that the petitioners "must be credited with their length of service" during the periods of prior employment and termination "for purposes of qualifying, vesting and calculating benefits" under the plan.

The petition (pp. 18-19) is incorrect in describing the District Court's opinion. It did not conclude, as the petition asserts, that the settlement agreement "expressly included the retirement benefits at issue" (Pet. App. 26a). As noted, a

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(Footnote continued from preceding page)

on a sound basis (Rec. App. 177-178). Only one or two petitioners had contributed to the plan when they were initially employed during 1965-70 (*id.* 156).

[9] The opinion quoted nothing in the agreement to support this broad assumption, which was directly contrary to the overall plan of the agreement and its express terms, particularly the Section III D provision that American had "no monetary or other obligation" unless expressly provided.

crucial provision of the agreement, after expressly imposing certain obligations on American, provided that it had no obligation to any class member "unless expressly provided in the agreement" (Section III D). The District Court opinion and order did not mention Section III D or use the word "expressly" attributed to it by the petitioners. They would thus create the impression that the District Court did not ignore Section III D but, by using the word "expressly," made a finding that the requirement of express provision was satisfied. Further, the petition is incorrect in saying that the District Court "did not review any extrinsic evidence of record." It is true the order purported to apply the principle that nothing extraneous to a "clear and unambiguous agreement" may be considered. But the opinion and order actually considered provisions of the retirement plan and a new 1980 version of the plan (*id.* 26a-27a).

DECISION OF COURT OF APPEALS

On respondent's appeal, the Court of Appeals rejected the District Court's interpretation in a detailed analysis, pointing out the error in the holding that "the Settlement Agreement unambiguously awards retroactive retirement credit to returning class members." (Pet, App. 4a-6a). After noting that the District Court had applied Illinois law under the principle that state law governs the interpretation of a settlement agreement, the opinion discussed Illinois decisions to the effect that the meaning of an ambiguous contract "becomes a question of fact to be submitted to the trier of fact." The opinion then explained what the petition chiefly criticizes, that the court was not following the "general rule" under which at that point the court would ordinarily remand to the District Court for findings of fact. The opinion acknowledged that in *Anderson* v. *City of Bessemer City*, 470 U.S. ___, 105 S. Ct. 1504 (1985), the Supreme Court "cautions courts of appeals against reviewing a

lower court's findings of fact *de novo,* even when those findings are based on documentary evidence." (*id.* 7a, n5).

Petitioners fail to mention the "strong reasons" explained fully by the Court of Appeals for not remanding the case for findings. The reasons are enumerated in the following quotation from the opinion (Pet. App. 6a-7a, Ital. added):

(1) "The parties have *thoroughly briefed* the issue before us and have submitted to us *all the extrinsic evidence* that they have.

(2) "The evidence is *entirely documentary; no determinations of the credibility of witnesses are required.* We are in as good a position to evaluate this evidence as the district court.

(3) "Our own survey of the evidence persuades us that it compels one conclusion and that a *contrary conclusion would be clearly erroneous.*

(4) "To remand the case would require yet a third round of argument in the district court, doubtless to be followed by a fourth round on appeal. When we know the inevitable outcome, it would be *a waste of judicial resources and an undue burden on the parties for us to order a remand.*"

The opinion then considered, under the following headings, the evidence relevant to the claim for retroactive retirement credits:

B. The Extrinsic Documentary Evidence (Pet. App. 7a)
   (i) American's Regulations (8a)
   (ii) The Collective Bargaining Agreement (9a)
   (iii) The Retirement Plan (10a)
C. Length of Service in Section V A (11a-13a)
D. Burmeister's Position (14a)
E. Analysis (15a-21a)

With two minor exceptions, only documentary materials were discussed in the analysis. The exceptions were two affidavits, one filed by petitioners (Rec. App. 98) and one by respondent

(*id.* 155). No question of credibility was involved in the opinion's treatment of the affidavits (Pet. App. 15a, 19a).

The reasoning in the Court of Appeals' analysis, concluding that the settlement agreement does not provide the claimed retroactive retirement credits (Pet. App. 20a-21a), is indicated by the following quotations:

> " 'Credited Service' is a defined term of the Retirement Plan that conspicuously does not appear in section V A. If 'length of service' is given its ordinary and natural meaning, it certainly would not mean 'Credited Service' under the Retirement Plan but simply the length of time the employee has been with the company . . . " (*id.* 15a)

> "Participation in the Retirement Plan was voluntary . . . Participation required more than an election to participate; members had to make regular contributions. In view of this it could hardly have been known to the negotiators of the Settlement Agreement that all the re-employed class members would want to participate or would have been able to make the required retroactive contributions . . . " (*id.*)

> ". . . In view of the complexity and precision of the Retirement Plan, . . . we think it most unlikely that the parties, in providing retroactive retirement credit, would have contented themselves with an oblique and uncertain reference to credit for 'length of service,'. . . The language of section V A more readily supports the conclusion that the parties did not intend to include retroactive retirement credit . . . " (*id.* 16a)

> "If the Settlement Agreement granted retroactive retirement credit to re-employed class members, American would be obligated to fund the retirement benefits actuarially attributable to these credits—an expenditure that American estimates at $850,000, or $86,500 a year for thirty years, almost a third of American's express monetary obligation under the Settlement Agreement. . . We think it unlikely that a uniquely retroactive benefit of such magnitude would have been buried so unobtrusively in the chosen language of section V A . . . if the parties had really intended to create it." (*id.* 17a-18a)

> "In addition, we think that section III D of the Settlement Agreement was intended in part to prevent just such massive monetary obligations from being teased out of the language of the Settlement Agreement after it was signed and approved .... No obligation to fund retroactive retirement benefits is expressly provided in the Settlement Agreement, and section III D bars implied obligations ... The parties knew the content of section III D and so would have realized that if the Settlement Agreement was to grant retroactive retirement credits, American's obligation to fund those credits would have to be set forth expressly in the agreement." (*id.* 18a-19a)

Petitioners contend (p. 20) that the Court of Appeals, once having found the settlement agreement ambiguous, had a duty of "stopping there and remanding the case to the district court for an evidentiary hearing" and that, instead, it "embarked on its own detailed and elaborate examination of the incomplete extrinsic evidence in the record." The petitioners assert that the Court of Appeals examined "the same incomplete extrinsic evidence" in denying their alternative motion to vacate the 1977 order approving the settlement and dismissing the actions. The record was not incomplete, as this opposing brief explains (p. 14). The Court of Appeals' disposition of the appeal, reversing the District Court order with directions on remand to deny both alternatives of petitioners' motion, followed respondent's contention to that effect in the Court of Appeals (Reply Brief, pp. 24-25).

A rehearing petition filed by petitioners in the Court of Appeals suggested a rehearing *en banc*, which required distribution of the petition among all judges in regular active service. The order of August 15, 1985 denying rehearing stated that no judge in active service had requested a vote on the petition and that all judges on the original panel voted to deny a rehearing (Pet. App. 29a). The certiorari petition was received by respondent on November 13, 1985.

ARGUMENT

I. Review of Court of Appeals' Interpretation of Settlement Is Not Warranted.

The nature of the basic interpretation issue is misconceived in the petition for certiorari. That issue is essentially whether the phrase in the settlement agreement (Sec. V A), "credited with the . . . length of service", impliedly included retroactive retirement credits when (1) "credited service" under the retirement plan required contributions rather than mere length of time of service and (2) the agreement (Sec. III D) negatived any implied obligation by respondent. Treating the issue as one of fact under Illinois law, the Court of Appeals analyzed many features of the agreement and the plan, explaining fully why retroactive retirement credits were not included and why the court did not remand for findings of fact. The petition contends that this decision was improper under *Anderson* v. *City of Bessemer City,* 470 U. S. ____, 84 L. Ed 2d 518 (1985).

As shown in Point I A below, the interpretation issue here is not similar to the issue of alleged discriminatory conduct in *Bessemer City.* Petitioners' method of conducting this proceeding is inconsistent with their request for a remand for an evidentiary hearing and findings of fact. Further, as shown in Point I B, the issue of interpreting the settlement agreement and the retirement plan actually seems to be one of law under Illinois decisions so that the general principles of *Bessemer City* limiting federal courts of review are wholly inapplicable.

A. *Court of Appeals' Interpretation as Matter of Fact Is Justified by the Record*

(1) *Bessemer City Is Not Similar*

In *Bessemer City,* after a nonjury trial with testimony by witnesses, the District Court's findings of fact concluded that petitioner had been denied employment on account of intentional sex discrimination in violation of Title VII. The Court

of Appeals, reversing, held that the findings were clearly erroneous. This Court, reversing the Court of Appeals, held it had misapprehended the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure, quoted in Appendix A hereto. The Court of Appeals' error was stated to be "its failure to give due regard to the ability of the District Court to interpret and discern the credibility of oral testimony" (84 L. Ed. 2d 531).

The *Bessemer City* opinion explained how Rule 52(a) contained the principle that it is not the appellate court's function to decide factual issues *de novo*. After quoting Rule 52(a) and describing its meaning as "not immediately apparent," the opinion said that "certain general principles . . . may be derived from our cases." The general rule against *de novo* fact finding on review was stated as one such principle:

> "The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)."[10]

The last sentence of Rule 52(a) exempts decisions on motions:

> "Findings of fact and conclusions of law *are unnecessary on decisions of motions* under Rule 12 or 56 or *any other* motion except as provided in Rule 41(b)." (Emphasis added)

The Advisory Committee Notes explain that the last sentence added in 1946 "will remove any doubt that findings and conclusions are unnecessary upon decision of a motion. . ." 28

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[10] The certiorari petition, in quoting (p. 23) the reference in *Bessemer City* to the *Zenith* opinion, fails to indicate that the statement against *de novo* decisions by appellate courts was based upon the "clearly erroneous standard" of Rule 52.

USCA, Rules 52-55, p. 18. The certiorari petition does not mention Rule 52.

The *Bessemer City* decision is not applicable to the supplementary motion proceeding here in which two legal instruments are interpreted to determine whether one (settlement agreement) granted petitioners "credited service" under the other (retirement plan). *Bessemer City* applied the "general principles" of Rule 52(a) to the main final judgment following a nonjury trial in a plenary proceeding in which the facts depended on the credibility of witnesses. That was also true of three Seventh Circuit decisions cited in the certiorari petition (p. 26n).[11] Even more remote from the present proceeding are two cited Seventh Circuit jury cases which held that the Court of Appeals could not try a jury's fact question *de novo*.[12]

(2) *Reasons Given by Court of Appeals Sustain Its Refusal to Remand for Findings*

With one exception, the certiorari petition does not attempt to contradict the "strong reasons" the Court of Appeals explained (pp. 6a-7a, quoted above, p. 8) for interpreting the settlement agreement and retirement plan instead of remanding for findings of fact by the District Court. Petitioners do not deny that the evidence in the record is entirely documentary, that no determinations of the credibility of witnesses are required. Petitioners do not even challenge the Court of Appeals' comment on its interpretation that "a contrary conclusion would be clearly erroneous." The Court of Appeals factual interpretation was eminently sound and convincing, as shown by the court's analysis noted above (pp. 8-10). A

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[11] *Barnes* v. *St. Catherine's Hospital*, 563 F. 2d 324 (7th Cir. 1977). *Continental Group Inc.* v. *Lincoln Land Moving & Storage Inc.*, 710 F. 2d 368 (7th Cir. 1983). *Denofre* v. *Transp. Ins. Rating Bureau*, 532 F. 2d 43 (7th Cir. 1976).

[12] *Leonteos* v. *Haase*, 410 F. 2d 633 (7th Cir. 1969). *Wyant* v. *J. I. Case Co.*, 633 F. 2d 1254 (1980).

contrary interpretation by the District Court would be clearly erroneous under the standard stated in *Bessemer City* because the reviewing court would be "left with the definite and firm conviction that a mistake has been committed" (84 L. Ed 2d 528). The result is, as the Court of Appeals explained, that to order a remand "would be a waste of judicial resources and an undue burden on the parties."

To refute the Court of Appeals' statement that the parties had submitted all the evidence they had, the certiorari petition repeatedly states (pp. 1, 2, 4, 20, 21, 28-32) that the record is incomplete for the decision of their motion. *Nothing in the record supports the assertion that the parties did not intend it to be complete.* The only reasonable inference from the record is that the parties considered the record ready for decision on all issues. The Court of Appeals' thorough analysis of the meaning of Section V A of the settlement agreement shows that the record contains unusually full materials to support the conclusions reached. Petitioners assert that "a wealth of extrinsic evidence potentially exists relevant to the issue" (p. 29). They specify nothing to explain this vague speculation.

The nature of the documentary evidence is particularly significant. The extraneous documents analyzed in the opinion were not fugitive pieces of paper but comprehensive legal instruments, such as the retirement plan itself and labor contracts between the flight attendants' union and respondent. The retirement credits petitioners seek are rights under the retirement plan, which is not extraneous but the central element of petitioners' claim. The pertinent provisions of the plan are not ambiguous. The Court of Appeals decision is more like a decision of law than a finding of facts.[13]

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[13] Petitioners could not contend that *Bessemer City* required a remand for findings of fact if the Court of Appeals had taken the position that the interpretation of the settlement agreement and the retirement plan was a legal decision, as held of labor contracts and

(Footnote continued on following page)

(3) *Petitioners Submitted Interpretation Issue for Decision by Court of Appeals*

The supplementary nature of this proceeding, unlike the plenary procedure in *Bessemer City*, is apparent from the manner in which it was conducted. As indicated in the Statement of the Case, the initiating paper was designated as a "motion" and stated in its first paragraph that it was made pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Rule 60, entitled "Relief from Judgment or Order", concludes that "the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." Petitioners chose the more summary motion procedure. Their unqualified designation of the motion as filed under Rule 60 set the stage for the usual contested motion practice, without evidentiary hearings but with extrinsic materials presented by exhibits and affidavits, under Rules 12 and 13 of the United States District Court for the Northern District of Illinois.[14] That practice does not even permit oral argument unless allowed in the court's discretion on request.

(Footnote continued from preceding page)

employee benefit plans in *Mackey v. National Football League*, 543 F. 2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U. S. 801, and *Teamsters L. 3481 H. & W. Fund v. Kohn Beverage Co.*, 749 F. 2d 315, 317-8 (6th Cir. 1984), *cert. den.* 105 S. Ct. 2024. See Point I B below, pp. 18-21, to the effect that the interpretation issue here can reasonably be considered to be one of law under Illinois decisions.

[14] Rule 12, quoted in Appendix B hereto, entitled "Motions", providing in detail for the procedure for presenting motions, states in subdivision (c), "Where evidentiary matter . . . will be submitted in support of a motion, copies thereof shall be served with the notice of the motion." Rule 13, "Hearing of Contested Matters", provides for the filing of memoranda by the parties supporting and answering "a contested motion, objections or other matters calling for a decision of the Court." Subdivision (d), after stating that any party may on notice call the motion or matter to the attention of the court, concludes, "When requested, oral argument may be allowed in the court's discretion."

The District Court record consisted only of papers filed in accordance with contested motion practice. Exhibits were attached to memoranda supporting and opposing the motion. Petitioners argued that the terms of the settlement agreement under the law of the State of Illinois, where the agreement was executed, were clear and unambiguous and that the interpretation granting them retroactive retirement credits was a pure question of law (Rec. App. 48, 52). But the petitioners' memoranda also discussed other documents in the record as well as affidavits they had filed (*id.* 97, 135). Neither petitioners nor respondent took depositions or sought an evidentiary hearing.

The prosecution of this proceeding under the contested motion practice was that followed in other enforcement proceedings in this litigation. After the settlements in the TWA and this American action, numerous motions were filed for claims under the settlement agreements by various former or rehired flight attendants. As cited in footnote 3 above, p. 3, three of the motion proceedings interpreting the TWA agreement produced opinions by the Court of Appeals, No. 82-1889 (unpublished), 713 F. 2d 319 and 730 F. 2d 509, cert. den. 105 S. Ct. 167.

In the Court of Appeals in this proceeding, the briefs filed by petitioners and respondent made no contention that it would be beyond the function of the Court of Appeals to interpret the settlement agreement from the materials in the record. Petitioners' brief relied on the materials outside the settlement agreement, such as Ms. Burmeister's affidavit for an account of a demand for retirement plan credits by her and another class member (pp. 5-7); provisions of the retirement plan (p. 7, n); a 1981 union contract (p. 27); circumstances surrounding execution of the agreement (pp. 32-35); a 1982 regulation of respondent (p. 20). They did not contend that the Court of Appeals could not interpret ambiguous terms of the agreement or consider extraneous materials.

On the contrary, petitioners conceded that extrinsic materials in the record could be considered. Their brief asserted that, if the court concludes that the terms of the agreement are ambiguous "and that the extrinsic evidence of record is insufficient to resolve the parties' intent", the case should be remanded with directions to "consider additional extrinsic evidence" (p. 49). They thus indicated that existing extrinsic materials in the record, if found sufficient, could be used by the Court of Appeals to "resolve the parties' intent." That was the conclusion of the Court of Appeals.

It was only after the Court of Appeals decision went against them that they contended in the petition for rehearing, as in their certiorari petition, that the decision was a *de novo* adjudication of facts beyond the Court of Appeals' function as a reviewing tribunal.

Illinois decisions on contract interpretation show that, in this situation, petitioners may not complain. In *Fields* v. *Franklin Life Ins. Co.*, 115 Ill. App. 3d 954, 958 (1983), instructions to the jury submitted by the plaintiff directed them to determine the meaning of a written instrument. On appeal, after the jury ruled against the plaintiff, the Appellate Court agreed with plaintiff's contention that the instrument was free from ambiguity and that its meaning was a question of law. But the court sustained the verdict (citing earlier decisions):

> ". . . although it was improper to allow the jury to determine the meaning and effect of this . . . receipt, where it was done at the request of the plaintiff, she can hardly complain that the jury resolved the issue of its meaning against her."

Petitioners waived any right to an evidentiary hearing by adopting and following the customary supplementary motion procedure to obtain a judicial interpretation and enforcement of the settlement agreement. The District Court might have granted a request for an evidentiary hearing. They made no such request and carried on no discovery. Their conduct of the proceeding in the District Court and the Court of Appeals indicated that they expected the settlement agreement to be interpreted from the materials then in the record.

B. *Court of Appeals Decision Is Sustained by Interpretation as Matter of Law Under Illinois Decisions.*

The Court of Appeals opinion turns on the distinction between issues of law and fact. It decided the interpretation of the settlement agreement as a factual issue only because it followed (p. 4a) the statement in an Illinois case, *Hagerty etc.* v. *Ginzkey*, 85 Ill. App. 3d 640, 641 (1980), to the effect that, if a contract is held to be ambiguous, the meaning becomes a question of fact to be submitted to the trier of fact. Accordingly, the opinion discussed all the evidence in the record in reaching its conclusion that Section V A of the settlement agreement did not grant the petitioners retroactive retirement credits under respondent's retirement plan. However, in addition to this roundabout route in deciding the interpretation issue as a question of fact, the same conclusion can be reached through either or both of two more direct routes by deciding the issue as a question of law under Illinois cases that refine the distinction between questions of fact and law.[15]

(1) Any possibility that retroactive retirement credits are included in the phrase "credited with the . . . length of service" in Section V A of the settlement is destroyed by the definition of "Credited Service" in the plan. That definition, as noted above, p. 5n8, states that credited service "shall not include any period for which he or she does not make Employee Contributions." The definition cannot be controverted. So *length of service* is not enough to get petitioners *credited service* under the plan.

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[15] Difficulties are to be expected over what this Court recently described as "the vexing nature of the distinction between questions of fact and questions of law." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1981). The opinion noted that Rule 52(a) "does not furnish particular guidance with respect to distinguishing law from fact "and that the Court did not" yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion." The Illinois cases to be discussed (pp. 20-21) provide a guidance for an interpretation of the settlement agreement as a question of law that excludes the claimed retirement credits.

and Section V A did not grant retroactive retirement credits. This conclusion is a matter of law, not fact, under any reasonable law-fact distinction.

The Court of Appeals made a more factual analysis of the effect of the definition of "Credited Service", relating it to the probable intention of the parties. The opinion says that, if the parties had intended to accord retroactive retirement credits to reemployed class members, it is highly likely that they would have used distinctive terms like "retirement credit" or "Credited Service" and

> "would have provided all re-employed class members the option of joining the plan or not, provided for the effective date of joining, and provided for the payment of back contributions so as to bring each member's account up to date" (Pet. App. 16a)

If this analysis is factual inference, it is based on the unambiguous definition of "Credited Service" in the retirement plan.

(2) Section III D of the settlement agreement presents a clear question of law. As explained in the above Statement of the Case, the design of the settlement agreement was to impose certain expressly stated obligations on respondent in Clauses A, B, and C of Section III and to relieve respondent of any monetary or other obligation "unless expressly provided", as stated in Clause D of Section III.[16] The opinion of the Court of Appeals said of Section III D (p. 18a):

> "No obligation to fund retroactive retirement benefits is expressly provided in the Settlement Agreement, and Section III D bars implied monetary obligations."

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[16] The retroactive addition of petitioners to retirement plan membership would have required payment of substantial sums of money by respondent for the large number of nonworking years involved. This is indicated by the estimated funding for retroactive credits under the District Court order amounting to one payment by respondent of $850,725 or $86,502 a year for 32 years. (Rec. App. 156). See the quotation of the Court of Appeals opinion, above p. 9.

Any doubt of whether Section V A impliedly included retroactive retirement credits is removed by Section III D, the provisions of which cannot be controverted and are not ambiguous.[17] No factual issue was involved in the conclusion that Section V A did not include retroactive credits since they were not specified in the section. This conclusion by the Court of Appeals amounted to a decision as a matter of law that the settlement agreement does not include such credits.

Such uses of incontrovertible documentary materials to interpret ambiguous terms of an agreement are decisions of issues of law under governing holdings of Illinois courts. In *Nerone* v. *Boehler,* 34 Ill. App. 3d 888, 891 (1976), the court noted that undisputed extrinsic facts may be used to ascertain the true meaning of an ambiguity in a contract as a matter of law. The opinion explained (italics added):

> "When the evidence of extrinsic facts is uncontroverted or shows the contract to have but one meaning, the court need not resort to inquiry by the trier of fact, *but must determine the meaning of the contract as a question of law.*"

In a more extensive discussion, *Ridenhour* v. *Mollman Publishing Co.,* 66 Ill. App. 3d 1049, 1051 (1978), explained:

> "The first issue which we feel compelled to address is the propriety of the trial court submitting a case involving the construction of a contract to the jury. Although the parties did not raise this issue on appeal, we believe that this case is not within the province of the jury. The law is well settled that the construction, interpretation and legal effect of a contract are issues to be resolved by the court as questions of law. (Citing cases) We note that if the construction of a written agreement is dependent upon extrinsic facts that are disputed by the parties, a situation

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[17] The legal effect of Section III D was to negative the principle of contract interpretation that what is "plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed". 17 Am. Jur. 2d *Contracts,* § 255, p. 649; 4 *Williston on Contracts* 534 (1961).

> not present here, the case must be submitted to the jury. (Citing cases) The only extrinsic evidence introduced in this case which allegedly reflected on the construction of the contract was that three Mollman employees received severance pay after being terminated for their incompetence. *Such evidence, however, was uncontroverted and, therefore, did not present a question of fact. Consequently, its legal effect, although in dispute, remains to be resolved by the court.*" (Ital. added)

To the same effect, see *National Tea Co.* v. *Commerce and Industry Ins. Co.*, 119 Ill. App. 3d 195, 200 (1983).

These Illinois decisions show that it is a legal rather than a factual conclusion for the court to decide that the alleged ambiguity of Section V A is resolved by the definition of credited service in the retirement plan and by Section III D of the settlement agreement. This result, supporting the same result reached by the Court of Appeals by the factual route, demonstrates fully that the certiorari petition should be denied.

There is no doubt that it is thus proper for respondent to advance grounds opposed to the grant of certiorari and in support of the decision sought to be reviewed although they were not discussed by the Court of Appeals. *Hankerson* v. *North Carolina*, 432 U.S. 233, 240, n6 (1977); *Dandridge* v. *Williams*, 397 U.S. 471, 475, n6 (1970). Stern & Gressman, *Supreme Court Practice* (5th Ed.) 478.

II. Review of Court of Appeals' Rejection of Motion to Vacate Is Not Warranted.

The record refutes the petitioners' contention that, the District Court not having reached the issue, the Court of Appeals should not have ruled on their alternative motion under Rule 60(b)(6) to vacate the 1977 order approving the settlement and dismissing the actions.

Petitioners' motion did not seek relief for any of the many reasons specified in Rule 60(b), including mistake, fraud,

misrepresentation, misconduct of an adverse party, etc. Any such ground was unavailable in 1983 to set aside the 1977 order for the motion must be filed within one year after the judgment. Petitioners' motion stated it was filed under Rule 60(b)(6), which is a general provision, "any other reason justifying relief from the operation of the judgment", for which the limitation is "within a reasonable time."

"Extraordinary circumstances" must be shown for relief under Rule 60(b)(6). *Ackermann* v. *United States,* 340 U.S. 193, 202 (1950). *Goland* v. *Central Intelligence Agency,* 607 F. 2d 339, 373 (D.C. Cir. 1979), *cert. den.* 445 U.S. 927. *Merit Ins. Co.* v. *Leatherly Ins. Co.,* 714 F. 2d 673, 682 (7th Cir. 1983), *cert. den.* 464 U.S. 1009. This Court emphasized in *Ackermann,* "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

Petitioners' motion and the affidavits filed in support show on their face that they fail completely to state a claim on which relief from the 1977 order can be granted. Instead of extraordinary circumstances to justify relief, they show nothing of substance.

The motion (Rec. App. 1) did not allege any fact or legal theory as a basis for vacating the 1977 order. In a reply memorandum, petitioners stated that, if the settlement agreement did not grant retroactive retirement credits, they were misled by the agreement and that the notice of the settlement to class members failed to describe adequately the benefits they were entitled to (*id.* 132). The notice described the settlement, informed the class members of a hearing on it, stated they could attend, could file written comments, etc. (*id.* 29-33). The notice said nothing about the retirement benefit plan. An affidavit of Ms. Burmeister stated that she had been led to believe that the agreement included retirement plan benefits when she signed the agreement (*id.* 98). The only factual basis asserted for her being misled is her statement that, before the settlement

agreement was made, she had explained, apparently to "one of the counsel for plaintiffs," "that retroactive credited service under the Retirement Plan must be included in the 1977 agreement in order for it to be acceptable to me" (*id.*).

The Court of Appeals (pp. 21a-22a) concluded that a remand was unnecessary for a ruling on the alternative motion because it had all the briefs and evidence presented to the District Court to decide the motion. It therefore departed from its usual practice in the interest of judicial economy and ruled on the motion instead of remanding it for decision below.

It is abundantly clear from the record that, for many reasons, there is no merit whatever to the motion to vacate:

(1) In 1977, through their counsel, petitioners chose to enter into a settlement agreement which contained no express provision for retroactive retirement benefits and excluded any benefit not so provided. After notice under Rule 23(e) of the Federal Rules of Civil Procedure, they chose not to object to the settlement but to seek its approval in the federal courts.

(2) The approval order petitioners want to vacate was procured by their own counsel in the District Court in 1977. They urged its affirmance in the Court of Appeals (573 F. 2d 960) and the denial of certiorari to review the affirmance (439 U. S. 876).

(3) The notice they claim to have misled them was prepared by their own counsel (Sec. IX of settlement agreement, Rec. App. 22) and was approved by the District Court as required by Rule 23(e). Any misleading of petitioners by their own counsel would at most create a claim against their counsel, not against respondent.

(4) Ms. Burmeister did not employ counsel for the claim to retroactive retirement benefits under the settlement until September 1982 (*id.* 136). So far as appears, she never

consulted the unnamed counsel who she said had led her to believe, before she signed the agreement, that retroactive retirement credits were included in it. Nor, so far as appears, did she ever seek a remedy through the counsel who had successfully represented her and the class since 1974.

(5) Overturning the order approving the settlement and dismissing the actions would begin the litigation all over and lead to a trial on pleadings filed in 1970, 1972, and 1974. The difficulties of litigating would be materially magnified by petitioners' lack of diligence, which also indicates the weakness of the claim.

The merits of the motion to vacate were fully argued in the Court of Appeals (Respondent's original, Rec. App. 38-42, 44, and reply pp. 17-22 briefs; Petitioners' brief, pp. 41-7.) As the Court of Appeals stated (Pet. App. 22a, n24), it also had before it the briefs and evidence presented in the District Court. It was therefore in as good a position as the District Court to decide the motion. It departed from its usual remanding practice "in the interest of judicial economy" and to "put the question of retroactive retirement credits under the Settlement Agreement finally to rest" (*id.*).

The petition for certiorari presents nothing specific for which a remand for supporting evidence would be justifiable. It is not uncommon for motions for relief from a judgment to be disposed of without a hearing. In *United States Fidelity & Guaranty Co.* v. *Lawrenson*, 34 F.D.R. 121, 123 (D.C. Md. 1964), aff'd 334 F. 2d 464 (4th Cir.), *cert. den.* 379 U.S. 869, the District Court opinion noted that it "cannot grant a hearing in every motion filed, since those of a frivolous nature would impede the progress of those which are meritorious", and the motion was said to be "clearly without substance." The Court of Appeals quoted the District Court opinion with approval and cited cases to the point that the movant was not deprived of due process of law by disposing of the motion without a hearing (p. 467).

Petitioners' position is not supported by decisions which petitioners claim conflict with the Court of Appeals' rejection of the motion to vacate instead of a remand for District Court disposition. In fact, *Dandridge* v. *Williams*, 397 U.S. 471, 476 n6 (1970), on which they mainly rely, fully sustains the Court of Appeals decision. There the District Court, which held a state regulation unconstitutional, did not consider a contention that it violated a federal statute. The Supreme Court took up and rejected the alleged statutory violation, explaining:

> "When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court. See *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 468; *United States* v. *Ballard*, 322 U.S. 78, 88. That is not the situation here, however. *The issue having been fully argued both here and in the District Court, consideration of the statutory claim is appropriate.*" (Ital. added)

The cited *Aetna* case, relied on in the petition here, remanded the case for consideration of an issue that had not been adequately presented in the Supreme Court. *Dandridge* holds that in some circumstances it is "appropriate" for a court of review to rule upon issues not reached in the court below.

Dandridge has been followed in later cases in which, as here, a due process issue not ruled on below was an alternative to the issue then decided. This court took up and decided the due process questions *de novo*. *Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 n6 (1983), rejected respondent's claim under the Eighth Amendment and then proceeded to deny any remedy under the due process clause of the Fourteenth Amendment. The opinion noted that the alternative due process issue "has been fully briefed and is properly before us", citing *Dandridge*, and "there would be little point in remanding" to allow the court below (Supreme Judicial Court of Massachusetts) to reconsider its holding under the relevant constitutional provision.

Thigpen v. *Roberts*, 468 U.S. ___, 82 L. Ed. 2d 23, 30 (1984), did not pass on a claim of double jeopardy raised in the petition for certiorari but held that the respondent's conviction was invalid under the due process clause. In denying the petitioners' contention that the due process issue should have been remanded to the Court of Appeals, this Court explained, after citing *Dandridge*, that the issue had been argued in the courts below and the factual record was "adequate, and would not be improved by a remand."

Petitioners, failing to understand that whether to remand is a matter of *appropriateness*, are wrong in finding a conflict between the Court of Appeals decision here and the Second Circuit holding in *Securities Investor Protection Corp.* v. *Morgan, Kennedy, & Co. Inc.*, 533 F. 2d 1314, 1322 (2d Cir. 1976). The issue for which the case was remanded for consideration had "received a minimum of attention by the parties", as the opinion explained in detail. The opinion then cited *Dandridge* and *Aetna* for the Supreme Court's caution against the consideration on review of issues "not adequately presented in the reviewing tribunal."

Here, as shown by the many sound reasons noted above, petitioners have presented nothing positive to support their motion to vacate, which can be granted only under "extraordinary circumstances." The record contains much that negatives the motion.

III. Court of Appeals Decision of Motion Without Remand Was Sound Judicial Administration.

It was a sensible and reasonable exercise of its function as a reviewing court for the Seventh Circuit to decide both alternatives of petitioners' motion rather than to remand to the District Court for an evidentiary hearing and decision.

The Court of Appeals had had extensive experience in reviewing various aspects of the litigation in many appeals listed above (p. 3 footnote 3). The issues in seven of the

appeals involved settlements in the *American* or *TWA* cases, as does the appeal here. The 1972 opinion in the first appeal, reported at 455 F. 2d 101, involving the 1971 settlement that was later disapproved in the second appeal, was written by Chief Judge Cummings who was on the panel that decided the appeal from which petitioners now seek review. The Court of Appeals knew the sound reasons for adjudicating petitioners' motion in the interest of judicial economy. It was entirely appropriate for that court to consider and reject the wholly unmerited motion to vacate rather than, by remanding for adjudication by the District Court, to postpone its decision on the same question until a probable appeal from a District Court order entered on remand.

Petitioners emphasize the expertness of Chief Judge McGarr in adopting their interpretation of the settlement agreement (p. 34). Pointing out that he reviewed, assessed, and approved the terms of the 1977 agreement, they ask, "who, other than Judge McGarr, was and is better qualified to ascertain the true meaning of the 1977 Agreement?" Retroactive retirement benefits were not mentioned in the hearing before Judge McGarr in 1977 (Pet. Br., App. 8-19) nor in his order of October 4, 1977 approving the settlement. His order of May 1983, reversed by the Court of Appeals, contained glaring errors. It did not mention the definition of "Credited Service" in the retirement plan nor Section III D of the settlement, each of which negative petitioners' claim to retirement credits. His memorandum read into the agreement, what was not there at all, that its clear terms entitled the returning class members "to receive any and all of the benefits they would have received had they not been discharged by American" (Pet. App. 26a, 27a).

The opinion of the Court of Appeals affirming the 1977 order (573 F. 2d 960-965) and the opinion now involved that reversed the May 1983 order are much more thorough and comprehensive than the District Court opinions and orders. Deference is due the Court of Appeals for its familiarity with

the litigation. Its decision of the need to terminate the litigation is based on the experience of years spent in its judicial administration.

Considering the interpretation of Section V A of the settlement agreement to be an issue of fact, as did the Court of Appeals, a remand for a decision below would be futile because any result contrary to its interpretation would be clearly erroneous, as the opinion explained (see above, pp. 13-4). Considering the issue as one of law under Illinois decisions, the Court of Appeals had a duty to adjudicate it. The rejection of the alternative motion to vacate, which obviously failed to state a claim for relief, was entirely appropriate in accordance with the principle of the *Dandridge* decision (above, p. 25). The Court of Appeals rightly avoided further rounds of argument in the District Court, another probable appeal to the Court of Appeals, and another effort to obtain certiorari here.

CONCLUSION

It was right and reasonable for the Court of Appeals to put a quietus on this litigation by deciding and rejecting both alternatives of petitioners' motion. The grant of certiorari would itself delay the final termination of the 1970 litigation which the settlement was intended to achieve in 1977. When this litigation is rightly understood, it is plain that the petition is wrong in contending that the Court of Appeals decision departs from usual and accepted judicial procedure. Nor does the decision conflict with holdings of this Court and Courts of Appeals as the petition wrongly asserts. Respondent urges its denial.

Respectfully submitted,

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Appendix A

Excerpts from Federal Rules of Civil Procedure

Rule 52.

FINDINGS BY THE COURT

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(As amended Apr. 28, 1983, eff. Aug. 1, 1983).

Rule 60.

RELIEF FROM JUDGMENT OR ORDER

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

Appendix B

Excerpts from Rules of the United States District Court for the Northern District of Illinois

RULE 12. Motions

(a) **Service of motion.** Except as otherwise provided herein or in the Federal Rules of Civil Procedure, motions may be presented and heard upon proof of written notice thereof served at or before 4 o'clock P.M. of the second business day preceding the day of presentment, Saturdays and legal holidays excluded. Where service of such notice is by mail, the notice shall be mailed at least seven days before the day of presentment. *Ex parte* motions and motions presented on stipulation may be presented without notice.

(b) **Copies to be presented to minute clerk.** Copies of all motions shall be presented to the minute clerk of the judge before whom the motion is to be made by 4:30 P.M. of the *second business day* before the motion is to be presented in court by counsel whose offices are located in Chicago. Counsel whose office is outside of the Chicago city limits may telephone the minute clerk by 4:30 P.M.

(c) **Copies of evidentiary matter to be served.** Where evidentiary matter, in addition to affidavits permitted or required under Rules 5 and 6 of the Federal Rules of Civil Procedure, will be submitted in support of a motion, copies thereof shall be served with the notice of the motion.

(d) **Motions for discovery and production; Statement of efforts to reach an accord.** To curtail undue delay in the administration of justice, this Court shall hereinafter refuse to hear any and all motions for discovery and production of documents under Rules 27 through 37 of the Federal Rules of Civil Procedure, unless moving counsel shall first advise the court in writing that after personal consultation and sincere

attempts to receive differences they are unable to reach an accord. This statement shall recite, in addition, the date, time, and place of such conference, and the names of all parties participating therein.

RULE 13. Hearing of Contested Matters

(a) Any moving party filing a contested motion, objections or other matters calling for a decision of the Court, shall file with the Clerk, within five days thereof, a short concise memorandum in support of his/her position, together with citations of authority. The adverse party shall file within ten days thereafter, an answering memorandum. The moving party shall file within five days thereafter, a reply memorandum. All briefs shall be filed in duplicate and copies served upon all other parties.

(b) Failure to file a supporting or answering memorandum shall not be deemed to be a waiver of the motion or a withdrawal of opposition thereto, but the court on its own motion or that of a party may strike the motion or grant the same without further hearing. Failure to file a reply memorandum within the requisite time shall be deemed a waiver of the right to file.

(c) The court may by order excuse the filing of supporting, answering and reply briefs and may shorten or extend the time fixed by this rule for the filing of briefs.

(d) Any party may on notice provided for by Rule 12(a) hereof call the motion or matter to the attention of the court for decision. When requested, oral argument may be allowed in the court's discretion.